AN INTRODUCTION

TO THE

PRINCIPLES OF EQUITY

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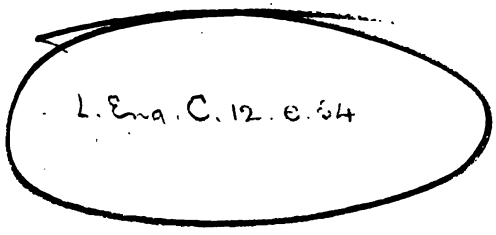

AN INTRODUCTION

TO THE

PRINCIPLES OF EQUITY.

BY

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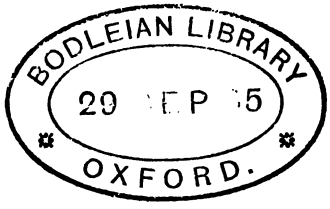

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PREFACE.

THIS work, being an elementary outline of the subject of Equity, is intended to be read as an accompaniment, or rather introduction, to larger works, as Arthur Smith's or Snell's Equity, and to facilitate their perusal for beginners, and also as a companion volume to Shearwood's Treatises on Real and Personal Property.

The Author begs to tender his thanks to his friend Mr. CLEMENT MOORE, of the Middle Temple, Barrister-at-Law, who has compiled this work jointly with him.

J. A. S.

LIBRARY CHAMBERS, TEMPLE,
July, 1885.

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AN

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PART I.

WHERE THE JURISDICTION RESTS ON THE SUBSTANTIVE PRINCIPLES OF EQUITY.

CHAPTER I.

ORIGIN AND JURISDICTION OF EQUITY.

Jurisdiction.

ALTHOUGH the word "Equity" means natural justice, yet it does not comprehend this principle in its broader sense; for there are many matters which the Courts do not attempt to remedy, from the difficulty of framing rules adequate to deal with them, and from the equivocal policy of attempting to enforce duties of a moral character only. Equity, in fact, will not relieve against defects of substantive law, but only against unconscionable acts of individuals. Thus, it did not make land liable for debts at a period when it was liable neither by the statute nor the common law. But if land was charged with the payment of debts, it would see that such charge was carried out.

Equity cannot lay a claim to be founded on natural justice any more than the common law; any of the defects of the latter in the doing of complete justice have been

owing to its mode of administration, arising from imperfect procedure, or from defects in evidence, rather than from any inherent deficiency in its principles. Many natural principles which might have been, but never have been, sanctioned by the Courts, owing, no doubt, to the disinclination of all systems of law after they have become stereotyped in form to receive accessions from a new source, however cognate, have now become recognized by statute.

Equity, therefore, is the complement of statutory and legal remedial justice—that residuum of natural justice which is capable of being judicially enforced, and which Chancery has, for reasons of its own, enforced, though its sanction has been omitted by the common law. This distinction is not materially affected by the Judicature Acts.

Definitions. The older definitions of equity, though true when no definite rules were fixed, are now inapplicable, equity being as much bound by settled rules as the common law, and being, in fact, a connected, laboured system, based on precedents; both interpret laws according to their spirit, and not according to the letter, and both are equally bound by the intent of the legislature, and unable to enlarge, diminish, or alter that sense one iota. In fact, as Blackstone says, both systems are equally artificial and founded on the same principles, but varied by different usages in the forms and modes of proceedings.

Origin. We have some glimpses of equity dimly from the early times. The clergy, being almost the sole repositories of legal knowledge, introduced much of the Roman law into the English system; and had this continued, the distinction between equity and common law would possibly not have arisen, for the Roman law first developed and then destroyed a similar distinction; and the history of our own jurisprudence discloses a similar process.

The common law, being founded on reason and justice, originally was capable of extension, but it soon completed its development. Precedents established by former, became binding on succeeding, judges, and new ones often

could not be established without interfering with those already made. Hence it became, to a certain extent, an inflexible system, and one not to be adapted to the progress of events.

The Roman law was inadequate to express the laws governing the tenure of land in England, even though not foreign to them. Further, in the reign of Edward III. it fell into disfavour, and in the next reign it sunk into absolute desuetude, the effect of which was to confirm the already positive character of the common law.

Had the courts of common law not been so rigid in their methods, and so servile in their adherence to settled forms, it would have been impossible for the Court of Chancery to have made the progress it has made, and to have established itself as a co-ordinate jurisdiction. For each wrong was supposed to fall under some particular class, and for each class there was a remedy; therefore a person must first determine under what class his case fell, and get the appropriate writ. Therefore, firstly, he might apply for a wrong writ and fail; or, secondly, his wrong might not fall under a known writ, and he would be remedyless. Although 13 Edw. I. c. 24, permitted the clerks of Chancery to frame writs to meet cases analogous to those for which writs were already existing, yet this remedy was inadequate, for—

1. The common law judges assumed jurisdiction to decide on the validity of these new writs, and often refused them.

2. Progressing civilization, giving rise to novel circumstances, increased the difficulty of adapting new cases to old forms; and further, new forms of defence arose for which no provision had been made.

3. When no relief could otherwise be obtained, the course was to petition the king, who referred the matter to his chancellor, "the keeper of his conscience"; and in the reign of Edward III. that official became a permanent

judge for cases requiring extraordinary relief; and when he considered the petition or bill in which the complaint was embodied was one deserving it, he summoned the defendant by writ of subpœna to appear personally. After a time signature by counsel that the case was a proper one superseded the personal examination of the chancellor; and the Chancery Jurisdiction Act (15 & 16 Vict. c. 86) replaced the writ of subpœna by a mere indorsement on the bill.

The foundation of modern equity may be said to have been the work of Lord Nottingham—it was matured by Lord Hardwicke—its expansion ceased with Lord Eldon.

The Judicature Acts.

The Judicature Acts have now fused legal and equitable remedies, and all proceedings are now commenced by writ of summons. The subject of equity has always been divided under the heads of exclusive, concurrent and auxiliary jurisdiction. The Acts, however, provide that law and equity are to be administered concurrently. Although this theoretically puts an end to the exclusive jurisdiction, yet, as the 34th section of the Act of 1873 assigns certain causes to the Chancery Division, it is practically retained. The former concurrent jurisdiction arose where courts of law did not, or did not without difficulty, afford adequate relief; and the auxiliary jurisdiction where, owing to their defective machinery or procedure, suitors had to seek the aid of equity in common law, which now is never necessary.

Chapter II.

THE MAXIMS OF EQUITY.

There are certain fundamental principles by which the Courts are governed, which are based upon a set of maxims, some of which are in common with the common law maxims, and some apply to equity only.

The principal ones—being those which have application to equity and not to the common law—are,

1. **Qui prior est tempore potior est jure.** ("He who is first in time is first in equity"; or better, "Where equities are equal, the order is time.")

(i.) This maxim does not always apply between persons having only equitable interests, for if the second of two assignees for value of a reversionary interest in stock standing in the names of trustees gives notice to the trustees first, he will have priority;

(ii.) Nor does it perfectly express the maxim to say that it holds between persons having only equitable interests, if their equities are equal. For if persons have equal equities, the Court will not lend its assistance to either. It is only on the ground of one having a better equity than another that it interferes at all.

(iii.) But the best statement is that, "between persons having only equitable interests, if such equities are in all other respects equal, the rule will apply." In such a contest, priority of time is the test last resorted to, when on an examination of their relative merits there is no other sufficient ground of preference between them. (Snell's Equity, p. 22.)

2. Where equities are equal the law must prevail.

This maxim is supplementary to the preceding one, and is illustrated by any case where the defendant has a claim to the passive protection of the Court equal to the claim of the plaintiff to call for its active aid—then he who has the legal estate will prevail.

This maxim involves the doctrine of **notice**, the leading rules of which may be marshalled as follows:—

1. A purchaser who, without notice of any flaw in the title or prior charge, has paid value *bonâ fide*, is safe against everybody, provided (1) he has the **legal** estate, or (2) gets it subsequently, there being no breach of trust entailed thereby. Thus if A. purchases and pays wholly or partially for Dale, ignorant that the vendor is a trustee selling in breach of trust, he cannot, by getting shelter under the legal estate after notice, oust the cestui que trust; for, unlike the case of tacking in a mortgage, he becomes a constructive trustee from the time he knows of the trust. Had he obtained the trust estate before knowing this, he would have priority; or (3) has the best right to call for it if outstanding, and an action against him will fail.

2. That if the purchaser under the above circumstances has an equitable estate only, the action against him will fail, if the application is made to the auxiliary jurisdiction (now obsolete) of the Court, as in

BASSET *v.* **NOSWORTHY,**

[2 W. & T. Cas. 1],

where an heir filed a bill against a purchaser from a devisee under an alleged revoked will of the ancestor, the purchaser having no notice of the revocation of the will, the power of enforcing discovery of the revocation of the will being a case in which equity alone had the power of assisting the plaintiff; discovery is now also a legal remedy, though it would not be available in the above case, but an action at law would lie for the recovery of the land.

If the application is made to the concurrent jurisdiction it will succeed, as in *Williams* v. *Lamb*, 3 Bro. C. C. 264. Where a widow claimed her dower against a purchaser from her husband, the plea that he had bought without notice of the marriage was unavailing.

3. Where a plaintiff has an equitable interest only, the defendant having no notice of it, order of time prevails in accordance with the maxims. The same holds if he has a mere equity—*e. g.*, a right to set aside or rectify an instrument owing to accident or fraud. But a purchaser with notice, actual or constructive, will find no shelter under the legal estate, as in

LE NEVE *v.* **LE NEVE,**

[2 W. & T. Cas. 35],

where a marriage settlement in a register county of lands, which were settled upon a second marriage, with notice of the first, prevailed over the second, although it was registered first. The object of the Registration Acts being to prevent, and not to be used as the instruments of, fraud.

The Yorkshire Registries Act, 1883 (47 & 48 Vict. c. 54, s. 14), as far as the lands in Yorkshire are concerned, has modified this case, by providing that no person is to lose the priority obtained by registration, in consequence of having actual or constructive notice of earlier unregistered documents, but only through actual fraud; and if there is a succession of purchasers, one from another, the first taking without notice, and all through him, are safe (*Harrison* v. *Forth*, Prec. Ch. 51).

Notice is of two kinds—**actual and constructive**—the former being that actually given, while the latter is evidence of notice, and varies so in different cases that no definition can be accurate. The cases may be grouped into two classes:— **Notice.**

1st. Those in which the party charged has an actual notice that the property was in some way affected, and he

is therefore held to have constructive notice of the facts, which he could have ascertained by inquiry (*Bisco* v. *Earl of Banbury*, 1 Ch. Cas. 287); and 2nd, where the Court is satisfied that he has designedly abstained from making inquiries with a fraudulent determination not to learn them, as non-inquiry after title deeds on a purchase (*Birch* v. *Ellames*, 2 Anstr. 247). But if a reasonable excuse is given when he inquires, and he makes no further investigation, negligence is not imputed to him.

Although notice to agents, &c. is held to be constructive notice to their principal, yet the Court, not wishing to make purchasers' titles dependent on the memory of those they employ, requires that the agents must be concerned in the same transaction, or in one very closely connected, and so material to the transaction as to make it the duty of the agent to communicate it. (*Vide* the Conveyancing Act, 1882, s. 3.)

3. Equity will do nothing in vain.

When the Court cannot effectually carry out what it attempts, it will not attempt to do so at all; for it will not submit to be made an object of ridicule by an ineffectual performance. Thus, specific performance of a contract requiring personal qualifications will not be attempted—as one by an artist to paint a picture—for if compelled, he might paint a daub, and thereby mock the Court; nor, again, will there be specific performance of a partnership at will, which, if completed, can be at any time dissolved.

4. Equity aids the vigilant and not the indolent.

If a man wishes to assert his rights by the assistance of the Court, he must be prompt. Unreasonably allowing time to go by, evinces that he has no keen sense of the injury suffered, and is consequently undeserving of the assistance afforded by the Court.

Thus, no relief from the fulfilment of a contract on the

ground of its having been entered into through the fraud of the other party will be afforded, unless it is sought instantly on the discovery of the facts.

5. Equality is equity.

Equity will give as far as possible equal rights to persons equally deserving. Thus, if two or more purchase land jointly, the Court will lay hold of any circumstance to construe such purchasers to be tenants in common; thus excluding the unequal incident of *jus accrescendi*.

6. Equity follows the law.

That is, so far as it can without sacrificing claims grounded on peculiar circumstances, such as fraud, which compel it to interpose, in accordance with Maxim 1.

(*α*) Thus, trust estates are governed by the rules of law as to descent and primogeniture; for the fact of these rules being hard on the younger children create no equity against the elder.

(*β*) It acts in analogy in regard to equitable titles and interests. Thus it acts upon the principle embodied in the Statutes of Limitation, and refuses relief under like circumstances, discountenancing laches.

7. Equity considers the intent rather than the form.

Thus it allows a mortgagor to redeem after the day of repayment is passed—the intent of a mortgage being that the mortgagee shall hold the property merely as security for his money, and not keep it entirely.

8. Equity will not suffer a wrong without a remedy.

This maxim is at the root of a large proportion of equity jurisprudence, inasmuch as it aims at supplying the defects once existing at the common law. Thus, it would be a wrong if a trustee was not compelled to carry out the terms of the trust, and it is upon this principle that the whole law of trust, which is the most important heading of

equity, and occupied a prominent place in calling the system of equity into existence, is based.

9. He who seeks equity must do equity.

Any person who seeks the assistance of the Court must act conscientiously. The grounds on which a married woman can claim her equity to a settlement afford an example.

10. He who comes to equity must come with clean hands.

This is similar to the above. Thus, if an infant, by fraudulently concealing his age obtains his trust property, he cannot, on coming of age, compel the trustees to pay it again (*Overton* v. *Bannister*, Hare, 503).

11. Equity acts in personam.

The Court compels obedience to its decrees by proceeding directly against the individual (*e. g.*, by committing him), and not as the common law courts have acted, against the property. The writ of subpœna was introduced (temp. Rich. II.) for this purpose.

12. Equity looks on that done which ought to be done.

Thus, land directed by will to be sold is regarded as having all the incidents of personalty from the date of the death. See the Doctrine of Conversion, *post*, Chap. IV.

13. Equity imputes an intention to fulfil an obligation.

The doctrines of satisfaction (see Chap. XII., *post*) and performance are based on this maxim. Akin to which is—

14. Debitor non præsumitur donare—applying to the principle that equity leans against the satisfaction of debts by legacies (Chap. XII., *post*).

Chapter III.

TRUSTS AND TRUSTEES.

The most important heading of equity is the law of trust, which may be considered thus—

1. As to its origin and history.
2. As to the formalities of creation.
3. As to the parties—and the respective capacities for making, holding and taking.
4. As to the kinds of trusts.
5. As to the position of trustees.

Sect. 1.—Origin and History of Trusts.

Origin.

At the end of the reign of Edward III. the ecclesiastics, in order to evade the Statutes of Mortmain, introduced the system of uses from Rome, and this system became soon generally adopted.

The system was as follows: Suppose A. enfeoffed B. and his heirs of land, directing him to hold it to the use or benefit of C. and his heirs, B. became owner at law. With the estate itself the Court of Chancery would not interfere. But seeing there was a direction imposed upon the conscience of B., to the effect that another, not he, should benefit by the gift, it would compel him to deal with the property according to the intent of the feoffor; that is, to hand over every benefit to C. By this device many of the rules of property were virtually defeated. The clergy, who were prohibited from acquiring land, could enjoy the advantages of it; wives were defrauded of their

dower, lords of their escheats, creditors of their extent for debt; to the total subversion of the common law of the realm. For none of these incidents attached to the beneficial interest of the person for whose benefit the land was held, and who was called the cestui que use; and no lord, or wife, or creditor of the legal owner, called the feoffee to uses, benefited, for he himself had nothing to give. Equity extended the doctrine further, to the effect that if A. voluntarily enfeoffed B., making no mention of the word "use," the Court presumed that B. was intended to hold it for A.'s own benefit, and this was called a resulting use; the smallest consideration, however, given by B., or the statement that he was to retain it for his own use, would prevent the equitable interest from resulting. In this manner proprietors frequently contrived to retain their estates, avoiding the feudal disadvantages of forfeitures, escheats, &c.

The Statute of Uses, 27 Hen. VIII. c. 10, was passed to put an end to all this, enacting that when one person was seised to the use of another, the person who has the use shall be deemed seised. It was, in fact, to the effect that the former equitable owner should henceforth be the legal one; and the other, a mere conduit pipe for transmitting the estate to him. Thus C., in the first of the above cases, and A., in the second, would enjoy both legal and equitable ownership, the whole formality in the latter case amounting to nothing.

The Statute of Uses has been totally evaded and rendered nugatory, as follows:—Suppose the gift was to A. and his heirs, to the use of A. and his heirs, to the use of or in trust for B. and his heirs. A. gets the legal estate because of the statute; but, on the same grounds as it interfered before its passing, the Court again interfered, holding that the benefit was designed to enure for B., and he therefore should be the equitable owner, and such is the law now. The estate is called a trust estate, A. being the

trustee, and B. the cestui que trust. The word "trust" is always used in the grant, though "use" would do as well.

The principles of the modern Court of Chancery in its jurisdiction over trusts differ in some respects from the ancient Court in its rules as to uses. The latter was satisfied by any consideration, however small, being paid by the grantee; while the former looks to all the surroundings of each case, and will interfere whenever there is anything suggestive of fraud or other inequitable matter. Its rules are in accordance with those of the common law, when no reason induces it to deviate from them; thus, the rules as to the quantity and quality of equitable estates, and their descent, are the same as in legal ones, consonant with the maxim, "Equity follows the law."

In property to which the Statute of Uses has no application, that is, to copyholds, leaseholds and pure personalty, the legal estate passes without the word "use," as was formerly the case in freeholds; for, owing to the word "seised" in the statute, only freeholds are included.

Sect. 2.—Formalities for the Creation of a Trust.

Formerly, no formalities were required. All that was necessary was, to show that a trust was reposed upon the conscience of the grantee.

By the Statute of Frauds (29 Car. II. c. 3), s. 7, all creations and declarations of trust of lands, tenements and hereditaments, must be manifested and proved by writing, signed by the beneficial owner, or by his will. **Statute of Frauds, ss. 7—9.**

By sect. 9, all grants and assignments of any trust must be in writing, signed by the party assigning, or by his will. Sect. 8 excepts from the statute trusts arising or resulting from any conveyance of lands or tenements by implication or construction of law, and trusts transferred or extinguished by act or operation of law.

Copyholds and leaseholds are in the 7th section, but

pure personalty is not, but is still *averrable*, that is, capable of being declared the subject of a trust by word of mouth.

Sect. 3.—Parties to a Trust.

1. The settlor.

Any person may create a trust who can deal with the beneficial ownership of property, even and although not the legal owner.

2. The trustee.

Any person can be trustee who can be made a recipient of the legal estate. There are some persons whom it is unadvisable to select, *e. g.*, the Crown, owing to the difficulty of compelling the performance of the trust; a bankrupt—it being hardly judicious to choose a person as the repository of another's property who has failed in taking care of his own.

In

HARDING *v.* **GLYNN,**

[2 W. & T. Cas.],

A. by will gave personalty to his wife, desiring her at or before death to give it amongst such of his relations as she should think most deserving. It was held that the wife was intended to take beneficially only during life, and that so much of the property not disposed of by the wife according to the power should be divided equally amongst the testator's next of kin at the wife's death. This being a **power in the nature of a trust,** she was bound to distribute amongst his relations (not necessarily those who were his next of kin), the manner of doing so being alone left open.

In order to establish the relationship of trustee and cestui que trust, the words must be imperative, not precatory, the subject certain and the object certain.

(1.) **Words imperative.** Thus, to "wish and request," "recommend," "entreat," "do not doubt but," and like expressions, create a trust. But where A. gave a house to his wife, wishing her sister should live with her, it was no trust, as the Court could not enforce it.

(2.) **Subject certain.** "To give what should be left at his death," "what he may have saved," "well knowing he will remember the poor," "to consider the testator's relations," create no trust, being so vague.

(3.) **Object certain.** "Hoping the donee will continue the property in the family," "not doubting his wife will consider his near relations, as he would have done had he survived her," create no trust, being too indistinct.

3. The cestui que trust.

Who can be.

As a general rule, any person who can take the legal estate can be made the recipient of the equitable. But there are some cases which require special mention—

(1.) Voluntary Trusts.

ELLISON *v.* **ELLISON**

[1 W. & T. Cas.].

Voluntary trusts must be complete to enable the cestui que trust to enforce them.

If the trust is of a voluntary nature, it must be complete in order to be binding. For the cestui que trust cannot force the settlor to complete it.

An agreement to convey (which is regarded as evidencing a contract), or an imperfect conveyance, is not binding, unless it is for value; for equity will not enforce an agreement without consideration. If voluntary, the settlor must himself complete the relationship of trustee and cestui que trust, and that in the way recognized by law. The Court will not do so at the instance of the latter, being a voluntcer.

To make the trust complete—

1. Where the donor is legal and equitable owner,

α. He must actually have conveyed the property to the donee in trust for him, or he must have declared himself a trustee for him.

β. If, without making any declaration of trust, he has attempted to make a legal conveyance, but has failed to do so—

(1) If the property is such as admits a complete conveyance *at law* (and almost all property now admits of such a conveyance), the Court will afford the donee no aid (*Antrobus* v. *Smith*, 12 Ves. 39);

(2) But whenever it was incapable of transfer at law, it has always been held that the conveyance would be good if the donor had done all he could to perfect it (*Edwards* v. *Jones*, 1 M. & C. 226).

2. Where the donor has an equitable interest only,

α. If he directs the trustees in writing (notice to or acceptance by them of the trust being immaterial), or even by word of mouth, if the subject-matter is personalty, a valid trust is created (*M'Fadden* v. *Jenkins*, 1 Ph. 153).

β. Also, he may assign his equitable interest directly to another.

The intention of the donor to constitute himself, or to direct a third person to be a trustee, may be gathered from his conduct.

Trust for payment of debts.

When a trust is once complete, it is irrevocable as far as the settlor is concerned, whether the cestui que trust is a volunteer or not. There is one exception, and this is, where a debtor makes a transfer to trustees for the payment of his debts, for such a conveyance is supposed to be for the debtor's own convenience; but if a creditor has *assented* to it, or done some act testifying his acquiescence

(mere notice of the fact is not sufficient), it becomes irrevocable (*Field* v. *Donoughmore*, 1 D. & W. 227).

(2.) **Illegal trusts.**

A body or person who owing to statutory provision cannot take the legal estate, cannot take the equitable. Thus, by means of trust, objects who are forbidden to become donees owing to moral rules (as future illegitimate children), cannot take. Nor can a trust be so framed as to transgress the rule against perpetuities, or the Thellusson Act. Nor can the Mortmain Act be broken, for it was passed specially to prevent land being given to charities by way of private trust. But as far as possible, without contravening any positive rule of law, equity endeavours to uphold and favour charitable trusts.

A cestui que trust cannot take in violation of principles of law.

Legal estates cannot be limited to objects of charity, such as the poor of a parish in perpetual succession, but equity, provided statutory law, or the Mortmain Act, is not transgressed, and provided the object is charitable and not superstitious, will endeavour to carry out eleemosynary gifts.

Charities favoured in equity.

43 Eliz. c. 4 lays down what objects are charitable. But the statute is widely interpreted, and includes many bequests which are not in it according to the letter.

Instances of the desire of the Court to uphold charitable bequests occur—

1. When the objects are as above stated, as the poor of a parish; and

2. Where a testator has intended to give property for an object exclusively charitable (not one merely so at the discretion of the trustees), in a manner not contravening the Statutes of Mortmain, but has not distinctly pointed out the special mode of application, or manifested a general intention of charity, or when a conveyance for that purpose is somehow defective, or when the object being definite is one which does not exhaust the proceeds,

the Court will remedy any defect, or apply it or such surplus to such charitable purposes as it thinks fit. Whereas in the case of a private individual, the property or the surplus would result to him, or his representatives, as undisposed of.

3. When the literal execution of the trusts of a charity becomes impossible, the Court will execute them cy près, that is, following as nearly as possible the original purpose, as in

ATT.-GEN. v. IRONMONGERS' CO.

[2 Beav. 313],

Cy près. where there was a partial bequest of residue for the redemption of British slaves in Barbary, and there being none, the Court directed a master to sanction a scheme cy près, giving the portion to other eleemosynary legatees under the will.

(3.) Secret Trusts in Wills.

Neither can a cestui que trust take by means of a testamentary instrument, unless such instrument is in conformity with the Wills Act. For the ownership embraces the legal and equitable interest, and the latter cannot be informally disposed of any more than the former. Thus, Dale cannot be given in a will to A. on trust, and then the declaration of trust be signified by an informal paper, or by a declaration of trust not attested or communicated to the devisee, and assented to by him in the testator's lifetime.

An exception occurs where a devisee or legatee has fraudulently procured a gift to be made to himself by undertaking a secret trust, such undertaking causing the will to be made in the manner it is made; in this case the trust must be carried out. Further, a devisee may carry out what he considers to be the testator's wishes, even in favour of a charity, provided there is no trust in the will, and no communication made to him in the testator's lifetime.

(4.) **Fraudulent trusts.**

All gifts, whether by way of trust or otherwise, defrauding creditors are void against them.

(a) 13 Eliz. c. 5 prevents creditors being defrauded by covinous conveyances and gifts. This means those not *on good consideration and bonâ fide, both these requisites being necessary.* It was once thought that the mere fact of the settlor being indebted at the time of making a voluntary conveyance (*see Spiret* v. *Willows*, 34 L. J., Ch. 367) invalidated it even against subsequent creditors, but this is not so, unless they can show (*as remarked in Freeman* v. *Pope*, L. R., 5 Ch. 538) that the money lent by them has been applied in paying off previous creditors, so that they "stand in their shoes." The settlor, in fact, must have been insolvent at the date of the settlement or immediately after. 13 Eliz. c. 5.

(b) 27 Eliz. c. 4 provides that a voluntary conveyance of any hereditament, including leaseholds, but *not chattels personal*, is void against a subsequent purchaser (including a mortgagee or lessee) for value (*from the settlor himself only*), even though with notice of it. It is, however, good against the settlor, who cannot compel specific performance against the purchaser, though the purchaser can compel it against him. 27 Eliz. c. 4.

Lawful considerations are either—

1. **Meritorious or good**—such as those founded on natural affection or generosity.
2. **Valuable**—as money, marriage or the like.

A post-nuptial settlement in pursuance of an ante-nuptial parol agreement, is good against a purchaser for value without notice of it (the Statute of Frauds requiring writing merely to bind the husband); not so, however, if there has been no previous ante-nuptial agreement, though a slight consideration will support such a settlement (*Hewison* v. *Negus*, 16 Beav. 592).

Even to support an ante-nuptial settlement in the mar-

riage there must be a consideration flowing from the wife. In *Columbine* v. *Penhall* (1 S. & G. 228), A. married B., who had previously lived with him, and settled property on her. It was decided she gave no consideration, and the settlement was invalid against a purchaser from A.

Bills of Sale Act, 1878.

(c) The Bills of Sale Act, 1878, makes bills of sale of personal chattels void against a trustee in bankruptcy, general assignees and execution creditors, unless registered in seven days, and re-registered every five years.

Bankruptcy Act, 1883.

(d) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47, provides that any post-nuptial settlement made within two years of bankruptcy is void, and is also void if made within ten years, unless (1) the person to be benefited can show that it was not fraudulent as against the creditors of the settlor, and that his interest in the property passed to the trustees of the settlement on the execution; and, unless (2), it consists of property that has accrued to the settlor through his wife during coverture, and is a settlement on the wife and children.

Also ante-nuptial agreements to settle acquired property are void unless the property is acquired and settled before bankruptcy.

(5.) Property not capable of being the subject of a trust.

Choses in action.

All property which is capable of transfer can be subjected to a trust. Formerly, at the common law, choses in action could not be assigned, but equity has always disregarded the common law rule, and has allowed, for instance, a mere expectancy, such as the interest of an heir (*Hobson* v. *Trevor*, 2 P. W. 191), or that which a person may take under the will of another then living (*Cooper* v. *Bennett*, 9 Beav. 252), or the future cargo of a ship (*Lindsay* v. *Gibbs*, 22 Beav. 522), to be transferred for value.

Various statutes, terminating with the Judicature Act, 1873, s. 25, have, however, broken in upon the common

law rule, and the Chancery doctrine, that an order by a creditor to his debtor on a third person to pay the latter out of funds of the debtor's which he has, is a valid assignment, is now recognized; but a mere mandate from a principal to his agent, not communicated to a third person, will give the latter no interest in the subject of the mandate, as it may be revoked at any time before it is executed.

The assignee of a chose in action should do all he can to place every person, who has an equitable or legal interest in the matter, under an obligation to treat it as his property; that is, he must give notice to the legal owner of the fund, else he is guilty of the same degree of neglect as he who leaves a personal chattel, to which he has acquired a title, under the absolute control of another; and will be postponed to third persons taking a legal title without notice.

An assignee of a chose in action takes it subject to all equities.

Equity will not allow—

1. Assignments of pensions or salaries;
2. Or of anything partaking of champerty or maintenance;

but an interest pendente lite may be purchased.

A purchase from a defendant being always valid, owing to his having the possession of the property.

Sect. 4.—Trusts: their Kinds.

Kinds.

Trusts arise by act of party and act of law. Those arising by act of party are express or implied; the latter may be defined to be those based on the presumed but unexpressed intention of the settlor. Those arising by act of law are resulting and constructive.

1. Express Trusts.

LORD GLENORCHY *v.* **BOSVILLE,**
[1 W. & T. Cas. 1].

An express trust is one which is clearly expressed by the author, verbally or in writing. It may be (i) either executory or executed, (ii) voluntary or for value.

Executed. (1.) **Executed**—*e. g.*, where no act is necessary to be done to give effect to it; as, where an estate is vested in trustees and their heirs in trust for A. for life, remainder to B. for life, remainder to the heirs of the body of A.

In executed trusts equity will put the same construction as a court of law puts on limitations of legal estates: thus, in the above example, the rule in *Shelley's case* is followed; A. will take an estate tail, the words "heirs of the body" being considered words of limitation and not of purchase.

Executory. (2.) **Executory or directory**—*e. g.*, one raised expressly or impliedly to make a settlement to uses indicated in, but which do not finally appear by, the instrument of trust; as where in marriage articles or in a will, property is vested in trustees to settle and convey in a more accurate manner; in both of which a further act, viz., a settlement or conveyance, is contemplated.

Own conveyancer. But a mere direction to convey does not render a trust executory, the settlor having been, as it is termed, *his own conveyancer*, that is, having accurately defined what the trusts are to be. (*Egerton* v. *Lord Brownlow*, 4 H. L. Cas. 210.) Executory trusts are construed according to the intention, and therefore the rule in *Shelley's case* is often departed from.

Shelley's case.

In marriage settlements. Thus, if in marriage articles it is agreed that realty shall be settled on the heirs of the body of both or either parties, as the children are designed to be benefited, the Courts will decree a settlement to be made on the husband or wife for life only; thus departing from the legal rule which

would give them an estate tail. (*Trevor* v. *Trevor*, 1 P. Wms. 622.)

The intention is not implied in wills, as in marriage articles, but requires to be expressed, and therefore the legal construction will be followed, unless any expression appears from which the Courts can gather a contrary intention; as where— In wills.

(1) It is directed that special care shall be taken that "A. shall not dock the entail"; or,

(2) That the settlement shall be made "as counsel shall advise, or as executors shall think fit."

(3) The estate is devised upon trust for A. and the heirs of his body, without impeachment of waste. If he had the estate tail he could commit any kind of waste, and no words could prevent him. Hence the insertion of the words is presumed to imply that a life estate is intended to be given to him.

2. Implied trusts.

An implied trust is one based upon the presumed but unexpressed intention of the settlor, occurring, according to Mr. Lewin, as in *Harding* v. *Glynn*, *supra*, p. 14, and consequently is a subdivision of express trusts, the difference being that, in the one case, the words are expressly imperative, and in the other precatory. Some writers include resulting under implied trusts (*vide* Snell's Equity).

Implied trusts also occur in cases like

1. **LAKE** *v.* **GIBSON,**
[1 W. & T. Cas.],

owing to the leaning of equity against joint tenancy, in consequence of there being the unequal incident of survivorship attaching to it. Thus, if two or more buy an estate, and have it conveyed to themselves jointly, equity presumes that he who paid most desired the beneficial interest to be proportionate to the amounts paid, and that the legal interest was conveyed to them jointly owing to some other

reason, and consequently holds the person who paid least to be a trustee for the one who paid most, of the surplus beyond that corresponding to their shares. So, when land is bought by two or more by way of mortgage or for partnership purposes, the object of these transactions is to be presumed mercantile, and *inter mercatores jus accrescendi locum non habet.*

2. In other cases, as if Dale is given to A., charged with the testator's debts, he is an implied trustee for the testator's creditors. If property is given to a parent with a direction touching maintenance, he is an implied trustee for his children, unless, indeed, the child becomes *forisfamiliated*—that is, leaves the family, as by setting up a separate establishment. So in any devise to fulfil a condition annexed to a devise; and there are many more cases.

3. Resulting trusts.

These occur whenever equity presumes that the settlor did not intend to part with the beneficial ownership, or having intended to part with it, the objects of his bounty have failed to take effect, and that being so, his presumed intention is, that the beneficial interest shall revert to himself or his representatives, and may be classified as follows:—

Purchase in the name of another.

It was decided in

DYER *v.* DYER,

[1 W. & T. Cas.],

that when a purchase is made of realty or personalty in the name of another or others (or of the purchaser himself with them), that other or others are trustees of the legal estate for the purchaser or purchasers (or proportionally, if they have paid a part), in the absence of evidence showing a contrary intention, such evidence not being contrary to the Statute of Frauds, as trusts resulting by operation of law are excluded from the statute, and therefore parol evidence is freely admitted either way. Should,

however, the person in whose name the conveyance is taken be wife, legitimate child, or person towards whom the purchaser has placed himself *in loco parentis*, the presumption is, that an advancement is intended; but this, again, may be rebutted by parol, the only limitation being that the Court will not allow evidence of subsequent declarations of the purchaser to be adduced to rebut it.

Unexhausted residue.

In both realty and personalty, any residue which the purposes of the trust do not exhaust, or any gift which fails (unless merely given by way of charge), results to the settlor, or falls into the residue of his realty or personalty respectively, if he is dead. But, supposing he dies intestate, and without heirs or personal representatives, then the trustee, if seised in fee, formerly kept the realty; but now, under the Intestate Estates Act, 1884, s. 4, it will escheat, and the personalty will go to the crown as *bona vacantia*, though an executor, in such a case, may keep the personalty. Indeed, before 1 Will. IV. c. 40, the presumption was in favour of an executor's keeping any residue before the next of kin, unless any circumstance indicative of a contrary intention appeared, but since the statute he is in all cases a trustee for the next of kin.

As to the devolution of the property whenever there is a total or partial failure of the objects of the trust, see *Ackroyd* v. *Smithson*, 1 W. & T. Cas., *sub* Conversion, Part 1, Chap. IV. (p. 33).

Imperfect declaration of trust.

Whenever an instrument of trust, being voluntary, is insufficiently executed, or whenever a person is stamped as trustee, but the declaration of trust is imperfect, or the object not stated, or the trustee is stated to hold on such trusts as the settlor shall hereafter name, and no trusts are named, or whenever an intention of trust is clear, but is not, or cannot be, carried out—in fact, whenever the person has disposed of the legal estate, but there is no ground for presuming that he intended to dispose of the equitable—

the beneficial ownership shall result to the settlor or his representatives, real or personal, according as it is realty or personalty.

4. Constructive trusts.

A constructive trust is one raised by construction of equity, without reference to the expressed or implied intention of the parties.

Thus, in

MACRETH *v.* SYMMONS,

[1 W. & T. Cas.],

Vendor's lien.

it was held that an equitable lien is a charge upon property in equity, as when a vendor conveys an estate, but is not paid, he will have a lien upon the property for whatever part of the purchase-money may be owing; and this holds though the consideration is upon the face of the instrument, and by a receipt endorsed upon it, expressed to be paid, and the purchaser is a constructive trustee for him. So *vice versâ*, the vendee may have a lien on the estate if he pays in advance.

The lien may be lost—

1. By taking an independent security, as a bond, it being shown that there is an intention to rely on the personal credit of the individual, and not on the estate; it must in fact appear that the note or bond was the thing bargained for.

2. If the purchaser is guilty of negligence—he is then bound by the claims of an equitable incumbrancer, as where, having paid and given a receipt, he leaves the title-deeds with the vendor, and thus voluntarily arms him with the means of dealing further with the property.

The estate will be bound by the vendor's lien in the hands of everybody (even a trustee in bankruptcy of the purchaser), except that of a *bonâ fide* purchaser for value paid without notice of it.

In

KEECH *v.* **SANDFORD,** [1 W. & T. Cas. (*The Rumford Market Case*)], it was decided that if a trustee or executor renews a lease in his own name he shall, *in every case and under any circumstances*, hold that lease for his cestui que trust; and the same rule applies to any person occupying a relation that can be termed *fiduciary*. **Renewable leases.**

3. The person renewing is, however, entitled to the expenses of renewal, for which he has a lien on the estate, the cestui que trust being a constructive trustee for him to that extent; and this benefit is extended to a part or limited owner who has made permanent improvements on the property, unless they are extravagant or fanciful.

4. Before the Conveyancing Act, 1881, a mortgagee's heir was a constructive trustee for his personal representatives.

Sect. 5.—The Position of Trustees.

A person is not bound to accept a trust, but he will be considered to have accepted if he exercises any control whatever over the trust property. Disclaimer of a trust, as refusing to act is styled, may be verbal, but should be by deed. **Disclaimer.**

By sect. 30, sub-s. 1, of the Conveyancing Act of 1881 trust and mortgage estates devolve upon the personal representative of the trustee or mortgagee, notwithstanding testamentary disposition to the contrary. **Devolution.**

When once a trust has been accepted, it cannot be renounced, nor can a trustee delegate the duties of his office except in the way of business, or in cases of necessity; and where there is more than one trustee, the powers entrusted to them must be exercised jointly by all, though the right to exercise them remains vested in the survivors. **Delegation.**

By sect. 34, sub-s. 1, of the Conveyancing Act, 1881, upon

an appointment of new trustees, the property subject to the trust becomes vested in the new trustee or trustees, by a declaration to that effect embodied in the deed appointing the new trustees. Before the Act a separate deed was necessary to effect this.

Duties. The general duties of trustees are to protect the trust property, to see to the due application of the income arising from it, and also to the final distribution according to the tenor of the instrument creating the trust. It is necessary for them to use the utmost diligence in carrying out the duties imposed upon them, and if any loss is occasioned by their neglect in this respect, they will be liable to the cestuis que trustent. Moreover, one trustee, in the absence of a contrary intention expressed by the settlor, is answerable for the defaults of his co-trustee.

Signing receipts. *Townley* v. *Sherborne* (2 L. C. 870) has decided that a trustee is liable, who had merely joined with his co-trustee in signing a receipt, not on the ground of the signing the receipt, but because he allowed the money to remain in the hands of his co-trustee, by whom it was mis-appropriated. Where a discretion, however, as distinguished from a duty, is vested in a trustee, the rule is not so severe, and he will not be held liable, *e. g.* for losses occasioned by an investment, if such investment is within the scope of his discretion, when it appears that he has used ordinary care in making a selection. There is a very stringent rule that a trustee is not permitted to derive any personal benefit from the trust, but he is allowed out-of-pocket expenses incurred in the proper execution of his duties, and is entitled to employ professional services.

Equity will not allow a trust to fail for want of a trustee, and the person in whom the legal estate is vested will be considered a constructive trustee, if there are no persons to fulfil the duties of a trust, unless he is a *bonâ fide* purchaser for value, in which case his title will prevail, for he has an equal equitable title with that of the cestuis que

trustent, and a superior legal title. A cestui que trust can assign his equitable interest, and need not give notice to the trustees, but the assignee should give them notice, otherwise his claim is postponed to a subsequent assignee for value who does so.

The equitable interest may also be disposed of by will, and dower and curtesy attach to it.

The liability of an equitable estate or interest for payment of debts is similar to that of a legal one, and it escheats now in all cases.

Constructive trustee.

The liability of a constructive trustee in respect to the duties of the trust is not so onerous as in the case of an express trustee, and the Statute of Limitations runs in his favour.

A trustee can obtain his discharge—

1. By consent of all the cestuis que trustent, being sui juris.
2. By special power contained in the instrument creating the trust.
3. By application to the Court.
4. Under sect. 32 of the Conveyancing Act, 1881—if there are more than two trustees—by deed, with the consent of the rest, and of the persons (if any) empowered to appoint new trustees.

CHAPTER IV.

CONVERSION AND RECONVERSION.

THIS subject is akin to the law of trust. Conversion arises—

Conversion.

1. By act of party; occurring—

i. **Expressly**—when a person directs land to be turned into money, or *vice versâ*, for certain purposes.

ii. **Impliedly**—as in

HOWE *v.* **LORD DARTMOUTH,**

[2 W. & T. Cas.],

where a testator gives (1) *by way of residue*, (2) *wasting or reversionary property* to (3) *several in succession*, it is implied that his trustees are to sell it, and convert it into some of those properties in which trustees may invest, so that all the beneficiaries may share in the enjoyment.

2. By statute.

(1) By act of law, land is sometimes compulsorily converted, as under the Lands Clauses Act, 1845, or the Partition Acts, 1868, 1876; (2) by act of party—as under the Settled Land Acts, 1882, 1884.

FLETCHER *v.* **ASHBURNER,**

[1 W. & T. Cas.].

Express conversion.

Act of party.

The principle is, that when money is directed (by deed, will, contract or otherwise) to be employed to buy land, or *vice versâ*, equity considers that the conversion has taken place from the time in which it ought to have taken place, and the property has all the attributes of its

converted form, whether it has been actually converted or not.

1. The language to produce conversion.

Language. *Curling* v. *May*, 3 Atk. 255, shows that the direction must be imperative, and there must be no alternative given to the trustee—which can be gathered from the words themselves, or from the fact that the devolution of the property is alone suited to it in a converted form. Thus, if trustees are directed to lay out personalty in land, or in some other good securities, and the settlement of the money so laid out is exclusively applicable to land, as if there is an estate tail given—the money will be considered land, the presumed option being outweighed. But were the limitations equally suitable to personalty, the word "or" would prevent conversion.

2. The period of conversion.

Period. Generally in instruments inter vivos this takes place from the date of their execution, and in wills from the testator's death; the rule, however, is subject to qualification should a contrary intention appear.

The rules of conversion do not apply at all in cases like *Wright* v. *Rose*, 2 Sim. & Stud. 323 (a mortgage with a power of sale), where the purpose is not to convert at all, but conversion may be an incident to the object in view.

Lease with option to purchase. In an instrument, such as a mortgage with a power of sale, the desire not being to change the nature of the property, the surplus money resulting from a sale—the power being exercised after the death of the mortgagor—will, after paying the mortgagee, revert to the heir (not the personal representative) of the mortgagor, and therefore the rules as to conversion are inapplicable. *Secus*, however, where there is an option to purchase an estate at a future time given to a person, and he exercises it after the death

of the owner (*Lawes* v. *Bennett*, 1 Cox, 167); but this is subject to qualification. For if the option is given first, and afterwards, by the owner's will, the estate over which it is to be exercised is expressly and specifically devised on certain limitations, then those who would have taken the land were the option not exercised shall take the money if it is; for the intention is that the land, or its value, shall go to the devisees.

But suppose the devise is first and the option to purchase given afterwards, then the personal representative will always get the money, for the option is a presumed revocation of the will. (*Weeding* v. *Weeding*, 1 J. & H. 424.)

3. Effects of conversion.

Effects. These are generally that land to be turned into money has the incidents of money, and *vice versâ*. Thus, on the latter succession duty is paid, and dower and curtesy attach; they are assimilated in every respect—for instance, land to be turned into money is an interest in land within the Mortmain Act.

4. The results of a total or partial failure of the purposes for which conversion is directed..

Results of failure. Total. This means—what becomes of the property when the persons to be benefited have died before they could demand a conversion. If they have all died, and the failure is total, the result is simple. The property will be in the same state as if there had never been any direction to convert at all; in fact, the land which was to be money will remain land, and *vice versâ*.

Partial. If the failure is partial—that is, if only some of the beneficiaries have died—the conversion must still take place for the benefit of the rest, and the question is—What becomes of the undisposed-of portion?

(1.) **If under a will:**

α **Land is to be turned into money.**

It was decided in *Ackroyd* v. *Smithson* (1 W. & T. Cas. 949) that this portion will result to the real representative of the settlor, but it will be reckoned to be money in his hands, the conversion having been effected, and at his death, therefore, will belong to his personal representative (*Smith* v. *Claxton*, 4 Mad. 492). But if there is a sale under an order in favour of an heir who has consented to such a sale, the surplus goes to the personal representative and not to the remainderman, and there is no presumed reconversion of the surplus (*Steed* v. *Preece*, 22 W. R. 432).

β **Money is to be turned into land.**

The same rule as prevailed in the above case follows, that the part unapplied shall still be considered money, and shall revert to the personal representative—that is, to the executor (*Cogan* v. *Stephens*, 1 Beav. 482); but here (according to *Reynolds* v. *Godlee*, Johnson, 536, 582) a deviation occurs from the former case; the money is not in the hands of the executor considered land (as the money in the hands of the heir was considered personalty), but still money, for whatever the executor holds quâ executor he holds as personalty. Therefore, in the first stage, the analogy between the cases is complete, but it ceases in the latter one.

The case of *Reynolds* v. *Godlee* is, however, now overruled by *Curteis* v. *Wormald* (10 Ch. D. 172), which decided that when personalty is bequeathed on trust for conversion into land, to be held on trusts which ultimately fail, land purchased before the failure of the trusts goes to the next of kin as realty.

Should the realty and personalty of the testator be blended together, and a failure of the object of conversion occur, they will be unblended, and the realty result to the real and personalty to the personal representative; and there

is no use in the testator saying that his heir shall take nothing, for if there is a failure as to the objects expressed in the will, the heir will still take, for he claims independently of the will; in nowise can he be excluded but by giving what would result to him in the event of a failure as above to another, *e. g.* by a residuary clause, and if that other cannot take he will still do so, and this whether there is a conversion out and out for the purposes of the will or not (*Jessop* v. *Watson*, 1 M. & K. 667).

47 & 48 Vict. c. 71, s. 7.

The law appears now to be altered by the Intestate Estates Act, 1884, s. 7, which section says "that when any beneficial interest in the realty of any deceased person, whether legal or equitable, is, owing to the failure of the objects of the devise, or other circumstances happening before or after the death of such person, in whole or part not effectually disposed of, then such person shall be deemed for the purposes of this Act to have died intestate in regard to the undisposed-of part."

Consequently, *Smith* v. *Claxton* may be considered overruled, and the lapsed portion to be land in the hands of the heir.

(2.) Cases under instruments inter vivos:

Here there is no difficulty. Land to be turned into money results as money, and money to be turned into land results as land, to the settlor, and continues in that shape in his hands.

Therefore, there is a material difference between cases of partial failure occurring in a will, and in instruments inter vivos. In the former, it will result in its original, and in the latter case, in its converted form, the reason being plain, that a will takes effect from the death, and a deed from date; and consequently, although the period of conversion is postponed, yet if any of the persons to be benefited by the conversion predecease the settlor, their share must revert to him, and in the converted form, for the objects not wholly failing, there must still be a conversion.

Reconversion.

This is that notional process by which a previous imaginary conversion is cancelled, and the property restored as it previously was.

Reconversion may take place—

1. **By act of party**, which may occur—
   (1) Expressly.
   (2) Impliedly, the burden of proof lying on those who allege reconversion.
2. **By act of law**, accruing—
   (1) When money is said to be "at home," the burden of proof lying on those who deny reconversion.
   (2) In compulsory sales of settled land under Acts, such as the Lands Clauses Act or Partition Acts, if the cestuis que trustent are infants, the proceeds in court are notionally reconverted into their original form.
   (3) Owing to equitable reasons, *e. g.*, where a trustee has tortiously converted trust property, the Court, if it can be followed, considers it to be still in its original form; again, land purchased for partnership purposes is considered money.

1. Reconversion by act of party.

1. Who may elect to reconvert.

Who may elect to reconvert.

"*Equity will do nothing in vain.*" Therefore, when a person for whose benefit a property is to be converted, prefers to take it in its original shape, the Court will allow him to do so, for did it refuse, he could immediately turn it back to that shape. But if his interest is only partial, the right demands consideration, and the test is whether his election to do so may be prejudicial to the others.

If money is to be turned into land, the beneficiary of an undivided share may take the money (*Seeley* v. *Jago*, 1 P. Wms. 389); but if it is land which is to be turned into money, he may not take the land, for the other part of

the estate would not fetch proportionally so high a price as the whole (*Holloway* v. *Radcliffe*, 23 Beav. 163), whereas in the former case it would make no difference.

The general principles guiding reconversion by partial or limited owners are:—

(1.) That a person may always elect as far as his own interest is concerned, provided he does not interfere with that of another.

(2.) That the Court will always study the interest of a person under disability in reference to reconversion.

2. Mode in which the election is made.

How made. Any express declaration is, of course, sufficient. But circumstances may imply an intention, and in a contest between the real and personal representatives of a deceased person, if it is land which is to be turned into money, presumptions easily arise indicative of an intention of the person entitled to elect to keep it as land; thus, suppose he has kept it unsold for a long time—suppose he has granted a lease—such acts as these are sufficient to convince the Court.

The Court is not so easily convinced if it is money to be turned into land. Thus, receipt of the income for however long a time shows nothing, but taking the money itself is, of course, conclusive.

2. Reconversion by act of law.

Money at home. Suppose A. on his marriage covenants in three years after to invest 1,500*l.* in land, to be settled on himself for life, remainder to his intended wife for life, remainder to their issue, remainder to A.'s heirs, and that A. and his wife die childless within the three years, she predeceasing him, A.'s personal representative is entitled to the money, and not A.'s heir, because A. had the money to be laid out in land for his own use, and there was nobody for him to compel to do it, and he could not sue himself; the right

and the duty centering in one person—the action is extinguished. Had, however, A.'s wife survived him, but for one instant, there would have been someone who could have called for conversion, and could have sued A.'s executor; as it is, the money is said to be at home; for A.'s heir claims under himself, as also his executor does, and for the heir to sue the executor in such a case would be like a man suing himself (*Chichester* v. *Bickerstaff*, 2 Vern. 295).

If, however, A. had shown any intention, expressly or impliedly, that the land should be bought, there will be no reconversion, and it lies on the real representative to prove this; for, in the absence of any intention, the presumption of equity, when reconversion arises by act of law, is in favour of reconversion, though when arising by act of party it is against reconversion.

CHAPTER V.

FRAUD.

Definition. FRAUD is infinite, and consequently is a subject not easily admitting of classification. The operation of equity in cases of fraud is very beneficial; for circumstances are taken into consideration, in determining the question, whether fraud is present in any transaction or not, which the law will take no account of.

In the leading case on fraud of

CHESTERFIELD *v.* JANSEN,

[2 Ves. sen. 125],

Lord Hardwicke laid down certain principles upon which courts of equity invariably act in setting aside transactions as fraudulent. The subject of fraud may be briefly divided into two classes, following the principles propounded in *Chesterfield* v. *Jansen*, and their sub-divisions:—

1. **Actual fraud**—that is, where fraud is apparent.
2. **Constructive**—where it is presumed.

Actual fraud.

ACTUAL FRAUD,

again, is either—

1. Positive, where there is a **suggestio falsi**; or,
2. Negative, where there is a **suppressio veri.**

In the leading case on positive fraud of

ATTWOOD *v.* SMALL,

[6 Cl. & F. 232],

the following three rules were established:—

1. The representation made must have been contrary to fact.
2. The party making it must have known it to be contrary to fact.
3. It must have given rise to the contract.

Where these three circumstances concur the contract is always voidable at the hands of the defrauded party; but the mere expression of opinion, as a tradesman praising his goods, with regard to the subject of the contract, is not a sufficient representation upon which the contract can be set aside. A contract, however, can be avoided where reckless statements have been made with a view to induce consent, and they subsequently prove to be false; though at the time the party making such statements may not have been aware of their falsehood. Where a party, to whom a false representation has been made, makes inquiries on the point for his own satisfaction, and proceeds to act upon his own judgment, he cannot afterwards rely on the misrepresentation as a ground for evading the contract; but if he acted upon the misrepresentation, though the means of ascertaining whether it was true or false lay within his reach, he is justified in doing so, and the contract is voidable.

So far as they can be applied, the three rules laid down in *Attwood* v. *Small* are substantially applicable in cases of negative fraud, as well as in cases of positive fraud; but the "*suppressio veri*" does not amount to fraud, unless there is an actual obligation on the part of the contractor to disclose that which he conceals.

No obligation, however, is imputed to a party, where both are in a position to ascertain the truth, to disclose facts which have come to his knowledge, which render his bargain more beneficial to himself; as, where a man contracted to purchase some land, knowing at the time, though the vendor did not, that there were minerals beneath the surface, and that the land was in consequence worth far more than the price agreed upon.

The case is different if a party to a contract conceals facts, which are not apparent or within the probable scope of the other's knowledge, as, where a contract for sale of land was avoided because the vendor concealed a defect in

the title; and hence a distinction is drawn between what are called latent defects and patent defects, the concealment of a latent defect being fatal, but it is otherwise in the case of a patent defect.

CONSTRUCTIVE FRAUD.

Constructive fraud.

The cases in which fraud is imputed to a party, owing to extraneous circumstances, may be classed under four headings.

I. Frauds, so considered on grounds of public policy.

Public policy.

The most important class of cases, which fall within the scope of the above principle, are those relating to restrictions imposed on marriage.

The general principle is, that conditions attached to a gift or devise in **absolute restraint** on marriage, are void—for the law encourages marriage.

In the leading case of

SCOTT *v.* **TYLER,**

[2 W. & T. Cas.],

all the authorities on the point were thoroughly examined. It is important to observe whether the condition attached is precedent or subsequent, the nature of the property, and the character of the restraint. The rules to be deduced from the various authorities may be shortly stated as follows:—

(1.) **If the condition is precedent and in general restraint of marriage,**

as where real estate was devised in trust for beneficiaries on the condition that they married only with the consent of certain persons. Here the condition is good, the gift only taking effect when the condition is fulfilled, although there may be no gift over, and the same principle is applicable when the subject of the gift or devise is personalty and not realty, with this exception, that the condition ceases to be operative when the beneficiaries have

attained an age when they can reasonably be expected to exercise a proper judgment, and the gift cannot then be defeated, even where there is a gift over in default of compliance with the condition; *à fortiori*, where the condition prohibits marriage with a certain individual, *i.e.*, particular restraint, such condition is good.

(2.) If the condition is subsequent and in general restraint of marriage.

The condition in such cases is invariably bad, even if there is a gift over.

(3.) If the condition is subsequent and in particular restraint of marriage.

In these cases, whether the property is real or personal, the condition is good, if there is a gift over, but, generally speaking, not otherwise. Such cases arise where there is a condition prohibiting marriage with a person of a certain race, or religion, or colour.

Distinction must, however, be drawn between the cases already mentioned, and those where it appears to have been the intention of the devisor to make a provision for a woman while single, with a gift over on her marriage. In such cases the gift will be upheld.

Contracts in restraint of trade, and attempts to influence testators, or to separate husband and wife, are all *primâ facie* fraudulent, as being opposed to public policy.

II. Frauds, so considered as being unconscientious.

Unconscientious.

Fraud is, generally speaking, imputed to transactions where the parties are not at arm's-length, and particularly to cases where persons standing in some sort of fiduciary relationship to others, have used their position as a means of securing their own advantage. The leading case on this branch of Equity is

HUGUENIN *v.* BASELEY,

[14 Ves. 273],

where a clergyman had contrived to induce a widow to

make a voluntary settlement upon him, and the Court set it aside.

Voluntary settlements or gifts of any substantial value are considered to be tainted *primâ facie* with a fraudulent element, on the ground of the peculiar nature of the relationship subsisting between the parties, especially in the following cases. Gifts between

(1.) Solicitor and client.

A counsel, in this respect, stands on the same footing as a solicitor, even where value is given in exchange; the onus of showing that the transaction was *bonâ fide* and in the interests of the client, always rests with the legal adviser.

(2.) Parent and child.

The same rule also applies where the gift is made by a child to anyone standing *in loco parentis*, and particularly in the case of a gift by a ward to the guardian.

(3.) Doctor and patient.

Contracts entered into with persons of infirm intellect, as with idiots, lunatics, and persons enfeebled in mind by old age, are always viewed with grave suspicion by Courts of Equity, and *bona fides* must be shown affirmatively.

Contracts entered into with drunkards when, at the time of contracting, the drunkard is actually incapable of appreciating the nature of the transaction, or of exercising his own judgment, are also *primâ facie* fraudulent.

The same protection is afforded by equity to common sailors, who, owing to their generous dispositions, are supposed to be easily made the victims of fraud.

III. Frauds, so considered as prejudicially affecting the rights of third persons.

Affecting rights of third persons.

In the leading case of

BARRY *v.* **CROSSKEY,**
[2 J. & H. 1],

the two following rules were enunciated by Lord Hatherley.

(1) "Every man must be held responsible for the con-

sequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified; provided, it appears, that such false representation was made with the intent that it should be acted upon by such third person, in the manner that occasioned the injury or loss."

(2) "The injury must be the immediate and not the remote consequence of the representation thus made."

The same principle holds good where the fraud is negative; and so it has been held, that a person who stands by and knowingly allows an innocent purchaser to acquire property the title to which is defective, as he knows owing to some right of his own in the property sold, he is precluded from asserting his right.

An important class of cases where the transaction is set aside on the ground that it is prejudicial to the interests of third parties, are found in

FRAUDS ON POWERS.

ALEYN *v.* BELCHIOR,

[1 W. & T. Cas.]

Frauds on powers.

The intention of the donor of a power of appointment is always strictly regarded by Courts of Equity in the construction it places upon the exercise of the power by the donee. Any attempt on the part of the donee to derive some benefit for himself, where none was intended, or to divert the benefit of the power into some channel other than the one delineated by the donor, or to defeat the object of the power entirely, is absolutely fraudulent and invalid. Nothing, however, prevents those amongst whom a donee of a power has the right to appoint from making some arrangement whereby the donee may derive some benefit, provided they all agree.

CHAPTER VI.

SECT. 1.—MISTAKE.

Distinguished from accident.

MISTAKE is chiefly distinguishable from accident, in that it is essentially subjective, whereas accident is distinctly objective. It may be said to relate to an erroneous condition of mind, induced by a misapprehension of what is about to take place, or a misconception of what has already taken place, or is presently occurring.

There are—

1. Mistakes in matter of law, and
2. Mistakes in matter of fact.

Mistake of law.

The principle **ignorantia legis neminem excusat** applies generally to the first class of cases, but the word **lex**, as meaning the law of the land, is not to be construed so as to include **jus**, *i. e.*, a private right, so where the ignorance has reference to a private right as distinguished from the law of the land, the mere fact of such ignorance is not necessarily prejudicial. Equity, indeed, will sometimes grant relief when the mistake results from ignorance of the general law, if the ignorance which leads to the mistake is of so gross a character, that a presumption of imposition or improper influence arises; as the eldest son, on intestacy, being induced to give up half the estate to his younger brother to save a dispute as to their rights. Equity will also relieve if the mistake of law is accompanied by a surprise; the case, of course, is stronger if the surprise is mutual, for in such a case neither party comprehends the effect of his own action.

Family compromises are invariably sustained by Courts

of equity, provided the mistake on which reliance is placed to set them aside relates to a doubtful point of law. It is essential, however, in such cases that all the parties must deal fairly by one another, and act **bona fide.**

Mistakes of fact, as a general rule, render a contract voidable at equity; provided— **Mistake of fact.**

(1) The fact with regard to which the mistake exists is material.

(2) There is no negligence on the part of the mistaken party.

(3) There is an obligation on the party who has knowledge of the fact to disclose it.

The jurisdiction of equity has frequently been invoked to relieve against mistake, for the purpose of rectifying instruments, and especially marriage settlements, where there is a discrepancy between them and the preliminary marriage articles. **Rectification of settlements.**

In the leading case of

LEGG *v.* GOLDWIRE,

[1 W. & T. L. C. 17],

the following rules were laid down:

(1) Where both articles and settlement are executed before marriage, and there is a discrepancy between them, the settlement is to be considered as expressing the final intention of the parties, and equity will not interfere, unless the settlement purports to be in pursuance of the articles.

(2) Evidence may be adduced to show that the settlement was executed in pursuance of the articles, though the fact may not appear on the face of the deed, and in such case equity will interfere to correct a discrepancy.

(3) Where the articles were executed before, and the settlement subsequent to, marriage, equity will always interfere to rectify the settlement in accordance with the terms of the articles.

Mistakes in the execution of powers are also, generally speaking, relievable at equity.

Defective execution of powers.

The non-execution, however, of a power is not considered a fit subject for relief, but the defective execution of a power is frequently remedied.

Powers arising under an Act of Parliament are construed more strictly than others, and their defective execution is often fatal, where otherwise relief would be given.

Persons in whose favour equity will relieve against a defect in the execution of a power are—

(1.) Purchasers;

(2.) Creditors;

(3.) A wife or child (if legitimate);

(4.) Charities—which are as a rule favoured by equity: but no relief is given where the persons seeking it are—

(1.) Volunteers;

(2.) A husband or grandchild;

(3.) Collateral relatives.

It is necessary, in order to obtain this relief, to show, not only that the donee of the power intended to exercise his right, but also that the form of relief asked for is not inconsistent with the intention of the donor of the power.

Further, in

TOLLET *v.* TOLLET,

[1 W. & T. Cas.],

it was held that where the donee is directed to execute the power by an irrevocable instrument, as a deed, and instead he does so by will, which is revocable, equity will relieve; but not if the donee, being directed to execute his power by a revocable instrument, adopts an irrevocable one—the former being immaterial, but the latter material, as the object of the appointor being desired to execute it by a revocable instrument might be owing to the settlor's knowledge of his disposition.

The language of the Wills Act precludes relief, when its provisions are not complied with, but where there is a

latent ambiguity in a will, parol evidence may be adduced to explain it, *e. g.* if a legacy is left to "Tom Jones," without any further description, and there are a hundred applicants, it is competent for the intended person to show by extrinsic evidence that the legacy was meant for him.

Sect. 2.—Accident.

Differing from mistake.

The term accident is in equity applied to some unexpected or unforeseen event, misfortune or loss, and not to vis major, or an inevitable calamity.

Accident is to be distinguished from mistake—the latter is referable to a state of mind existent at the time of the contract; the former relates to a state of facts subsequent to the time of the contract.

Before equity will grant relief on the ground of accident, it is necessary for the party seeking it to show—

i. That the common law remedy is inadequate;

ii. That he has a conscientious right to relief.

It follows, then, that this relief will be withheld where the necessity for it has arisen through the misconduct or negligence of the person seeking it.

Neither will equity relieve when it may be reasonably inferred that the contingency of the accident has been taken into consideration by the contracting parties; so a lessee, who has covenanted to keep the premises in repair during a certain period, will not be absolved from the duty of performing his covenant, on the ground that the subject-matter of the contract is destroyed by fire or accident of any description; for the bare fact of such a covenant is considered to be indicative of the lessor's intention to secure himself in such event.

Lost bonds.

The interference of equity on the ground of accident has been peculiarly beneficial in cases of the loss or destruction of bonds and title deeds. Common law, more

rigorous in its adherence to forms and formalities, afforded no relief, or rather no adequate relief. And further, proceeding upon the equitable principle, that "he who seeks equity must do equity," relief would only be granted to a plaintiff alleging his claim upon a lost bond, on the condition that a proper indemnity was given to the defendant.

Similarly, in

WHITFIELD *v.* **FAUSSET,**

[1 Ves. sen. 392],

where it was uncertain whether the title deeds to an estate were lost or fraudulently concealed, the Court, being satisfied with the defendant's evidence, gave him possession, until the defendant should produce the deeds which would have established the plaintiff's title, or should admit their destruction.

Annuity. Again, where an annuity given by will suffers diminution, owing to a reduction in interest on the stock by Act of Parliament, equity has granted relief against the residuary legatees, in favour of the annuitant, on this ground.

Apprenticeship contracts. So, too, in the case of apprenticeship, which is a contract of personal service, common law only entertained jurisdiction so far as to make the fulfilment conditional upon the health of the contracting parties; but equity has carried the principle farther, and, in the event of the master's bankruptcy, has ordered repayment of a proportional amount of the premium.

Chapter VII.

MORTGAGES.

At common law a mortgage is regarded as an absolute conveyance, by which the mortgagee becomes the legal owner of the estate transferred to him, subject only to the condition that if the mortgagor repays the money which the mortgagee has advanced, with interest as provided, within the time specified, the mortgagee will reconvey the estate. **Mortgages generally.**

But Courts of Equity, looking to the intent of the parties rather than to the form in which they purport to express their intention, have long since established the principle, that a mortgage is merely a security in the hands of the mortgagee for the repayment of the money advanced by him; that the mortgagor does not, in effecting a mortgage, part with the entire interest he possesses in the property mortgaged; and that the right of the mortgagor to redeem, *i. e.*, to buy back, the mortgaged property is really an estate itself, which is called the equity of redemption. Further, in the case of **The equity of redemption.**

HOWARD *v.* **HARRIS,**

[1 Vern. 190],

it was decided, "once a mortgage always a mortgage," *i. e.*, that one and the same deed could not at one time be construed as meaning a mortgage, and at another time as an absolute sale; and it is now a conclusive rule of equity, that where a conveyance is clearly intended to operate as a mortgage, no stipulation or condition to the contrary shall entitle the mortgagee to prevent the mortgagor from redeeming the estate. It must, however, be borne in mind, **Once a mortgage always a mortgage.**

that there are certain conditional sales which Courts of Equity will regard in the light of sales and not of mortgages; and if on the face of the instrument it appears reasonably clear that the transaction is intended to operate as a conditional sale, the vendor will be tied down and strictly bound by the terms of the deed. But such circumstances as the alienor remaining in possession, or the alienee being entitled to a proportion of the rents equivalent to the amount of the interest on the alleged purchase-money, or being responsible to the alienor for the surplus of such monies, would induce the Court to construe the deed as a mortgage; so, too, if the consideration was palpably inadequate. Mortgages of real estate alone are considered here. Mortgages of personalty, *i. e.*, bills of sale, falling rather under the subject of personal property than of equity.

Legal and equitable mortgages.

Two kinds of mortgages.

It is very important to observe the distinction between legal and equitable mortgages. A legal mortgage can only be created **where the legal estate passes** to the mortgagee, so that to ascertain whether a mortgage is legal or equitable, it is only necessary to ask the question, has the legal estate passed? if it has, the mortgage is a legal one; if not, it is equitable.

Equitable mortgages—how created.

Equitable mortgages are created—

(1) By an agreement in writing to effect a mortgage—the principle being, "equity considers that done which is intended to be done."

(2) By deposit of title deeds.

It was decided in the case of

RUSSEL *v.* **RUSSEL,**

[1 W. & T. L. C. 726],

that such a deposit was valid as an equitable mortgage, sect. 4 of the Statute of Frauds notwithstanding. Such a mortgage, however, is taken subject to any rights affecting

the property contained in the deeds deposited, existent at the time of the deposit. So if a trustee fraudulently effects a mortgage by depositing the deeds which he holds on behalf of the cestui que trust, the rights of the latter are not prejudicially affected.

(3) By the mortgage of the equity of redemption, which may be created by a duly executed deed; or where A., the legal owner, mortgages Dale to B., then to C., and afterwards to D., all three being by deed—the last two are equitable mortgages only, for the legal estate passed to A.; and though there can be any number of equitable estates in a property, there can only be one legal estate.

Only one legal mortgagee of a property.

The devolution of mortgaged estates.

I. Estate of the Mortgagor.

Mortgagor's estate devolves upon his heir or devisee.

The estate of the mortgagor is called the equity of redemption, and, upon the intestacy of the mortgagor, has always descended, and still descends, to his heir if intestate, otherwise to the devisee. This being the case, it seems to be but fair and reasonable that the person who gets the benefit of the estate should be the one to discharge the liabilities which attach to it. But until Locke King's Act (17 & 18 Vict. c. 113) was passed, the rule had only a limited application. By this Act the mortgaged estate was declared to be primarily chargeable with the mortgage debt in every case where a contrary intention was not expressed; and by 30 & 31 Vict. c. 69 (Locke King's Amendment Act, extending the principal Act to a vendor's lien and applying to a testator only), it was enacted, that a general direction to pay debts out of the personalty should not be deemed a contrary intention. Lastly, the Exoneration of Charges Act (40 & 41 Vict. c. 34) extends the above to hereditaments of whatever tenure (thus including leaseholds), and applies to an intestate or testa-

Locke King's Act.

tor, subject to contrary intention in the case of a testator *only*. These Acts are not retrospective.

II. The Estate of the Mortgagee.

Originally the mortgagee's estate in the mortgaged property, in like manner as the mortgagor's, passed to the heir or devisee, and the person who acquired the estate was naturally the one whose duty it was to reconvey it upon the condition being complied with. Now, since equity regarded a mortgage as merely a security for money advanced, it followed that such security formed part of the mortgagee's personal estate; and hence arose considerable complications, because, in cases of intestacy, the heir was the person who had to reconvey, upon request and payment by the mortgagor, while the personal estate derived the benefit. This anomaly was partially remedied by the Vendor and Purchaser Act, 1874; and then by the Land Transfer Act, 1875; and now, by the Conveyancing Act, 1881 (s. 30), it is enacted, that in every case the estate of the deceased mortgagee (including copyholds), at the time of his decease, shall devolve upon his personal representative.

Mortgage is regarded by equity as a security only.

Mortgagee's estate devolves upon his personal representatives.

Rights of a Mortgagor.

Redemption.

(1.) The right of redemption.

The right of buying back the mortgaged estate belongs, not only to the mortgagor, but also to his heir, devisee, or assignee, and, in fact, generally speaking, to every person interested in the equity of redemption, including a subsequent mortgagee.

It is necessary, however, for the mortgagor to give six months' notice of his intention to redeem, unless he pays the principal and interest within the time mentioned for such repayment. By the Real Property Limitation Act of 1874 (37 & 38 Vict. c. 57), the mortgagor's right of redemption must be exercised within **twelve years** from the time when the mortgagee either entered into possession, or

commenced to receive the rents and profits of the mortgaged estate, unless in the meantime he has received some part-payment of principal or interest, or other acknowledgment from the mortgagee of his right to redeem, and if so, his right will be barred in twelve years from such receipt.

The possession of the mortgagee must be adverse, *i. e.*, it must be clearly referable to the exercise of his right as mortgagee, or time will not run against the mortgagor.

Any person claiming under the mortgagor has the same rights in this respect as the mortgagor himself.

Whenever a mortgagor is entitled to redeem he has, by the Conveyancing Act, 1881, s. 15—

Assignment.

(2.) A right to compel the mortgagee to assign the mortgaged debt, and to reconvey the mortgaged premises, as he may direct, on the same terms on which the mortgagee himself would have been bound to reconvey—and this by the Conveyancing Act, 1882, s. 12, may be exercised by any incumbrancer, a requisition of a prior having precedence over that of a subsequent incumbrancer, and a requisition of any incumbrancer over the mortgagor.

While in possession (for it is to be observed that the mortgagor is liable at any time to be evicted without notice on non-payment at the time fixed—there being usually a provision that he may remain in possession until default) he has, by the same Act,—

Leasing.

(3.) A right to make certain leases specified by the Conveyancing Act, 1881, s. 18.

Suing.

(4.) Judicature Act, 1873, s. 25, allows him to sue in his own name on a lease or contract made by him (unless the cause of action arises jointly with another person) for the rents on possession of land, as to which no notice of the intention of the mortgagee to take possession has been given to him.

Tacking. **(3.) Tacking.**

This remedy vividly illustrates the distinction that is drawn between a legal and an equitable mortgagee, and also indicates the importance which equity attaches to a legal mortgage. If A. mortgages Dale to B., and then to C., and again to D., D. is permitted to buy up B.'s mortgage and oust C.:

I. Provided B. has the *legal* estate, for "when equities are equal the law prevails."

II. D. has no *notice* of C.'s mortgage when he advanced his money, for if he had, the above maxim would be inapplicable.

The leading case on tacking is—

BRACE *v.* **DUCHESS OF MARLBOROUGH,**
[2 P. Wms. 491],

in which the following additional rules were laid down.

1. A third or subsequent mortgagee can tack, even while a prior mortgagee is bringing an action to buy up the first mortgage.

   The legal estate under such circumstances has not inaptly been likened to a "*tabula in naufragio.*" The subsequent mortgagees are supposed to have but one chance of being paid their debt, and that is, getting hold of the legal estate; it is, therefore, merely a race between them, and the one who succeeds in first grasping the legal estate wins.

2. A judgment creditor or any other person who advanced his money without the security of the land cannot tack.

3. A first mortgagee lending a further sum on a judgment or a second mortgage can hold against a mesne incumbrancer until both securities are satisfied.

But by

ROLT *v.* **HOPKINSON,**
[9 H. L. Cas. 514],

overruling *Gordon* v. *Graham* (7 Vin. Ab. 82, pl. 7), a

mortgagee cannot with safety make further advances if he has notice of an intervening incumbrance.

Remedy common to legal and equitable mortgagees. Consolidation.

The doctrine of consolidation is to be distinguished from that of tacking.

Tacking, as has been shown, is the process whereby incumbrancers of *one and the same* estate seek to secure themselves. Whereas the term **consolidation** applies to a remedy which incumbrancers of *different* estates (belonging to the same mortgagor) may avail themselves of.

In its simplest form consolidation may be illustrated as follows:—

A. mortgages Dale to B., and then mortgages Blackacre to B.; the money advanced on both estates is the same, say 1,000*l.* It is subsequently ascertained that Dale is worth 2,000*l.*, but that Blackacre upon sale would only realize 500*l.*

Under these circumstances it is competent for B. to say (subject to the Conv. Act, 1881), upon A. stating his intention to redeem Dale, "I shall hold both my securities until both are paid off;" and this is called **consolidation.**

This doctrine, however, so simple at first sight, was formerly extended to extraordinary limits, and its operation entailed considerable hardship on purchasers of the equity of redemption and subsequent mortgagees.

It has already been noticed (*vide* Tacking) that it is necessary for a subsequent mortgagee to buy up the existing mortgages on the estate of which he is a subsequent mortgagee before he can get paid off himself (except in cases where *Rolt* v. *Hopkinson* applies), and also for a mortgagor to redeem all the mortgaged estates, if required, which he himself has mortgaged to the same mortgagee. But suppose A. mortgages Dale to B., and then effects a second mortgage on Dale to C., and afterwards mortgages Blackacre to D.

and Whiteacre to E. D. and E. then transfer their securities to B. (the first mortgagee on Dale). B. was formerly entitled, either as against the purchaser or mortgagee of the equity of redemption in Dale, if any, wishing to redeem, or against C. wishing to buy up the first mortgage on Dale, and obtain repayment, to hold all the securities in his possession, and decline to part with his security on Dale, unless the money advanced on the other securities was also repaid.

Recent cases have now considerably narrowed the doctrine of consolidation.

In *Willie* v. *Lugg* (2 Ed. 78), it was decided that consolidation could not be insisted upon where the mesne mortgage or the assignment of the equity of redemption had been effected before the transfer which brought the securities sought to be consolidated into the same hands. And in *Mills* v. *Jennings* (13 Ch. D. 639) and *Jennings* v. *Jordan* (6 App. Cas. 698), it was established, that consolidation could not be insisted upon where the mesne mortgage or the assignment of the equity of redemption had been effected before the creation of the securities sought to be consolidated. In *Baker* v. *Gray* (1 Ch. D. 491), the reason against permitting consolidation was considered stronger, the assignee having notice of the mesne mortgage.

By sect. 17 of the Conveyancing Act, 1881, it is now enacted that there shall be no consolidation at all in cases where either mortgage is created after the Act, unless a contrary intention appears in the deed.

LIENS.

Vendor's lien—what.

Equitable liens, unlike liens at law (which are merely rights of detention of chattels), are equitable estates, or charges on realty or chattels real, and are quite independent of the fact of physical possession.

A vendor who, in compliance with a contract for the

sale of an estate, has executed the necessary conveyance, the purchase-money being wholly or partially unpaid, notwithstanding that on the face of the instrument it is expressed to be paid, or a receipt for the amount is indorsed upon it, has an equitable lien on the estate for the amount remaining due to him.

This is the general principle laid down in the leading case

MACKRETH *v.* **SYMMONS,**

[15 Ves. 329].

Vendor's lien.

A vendor's lien against a purchaser for unpaid purchase-money will attach so soon as the purchaser has possession, even though the conveyance is not executed, and it extends to money lent by the vendor for the purpose of improving the estate.

It has been held to be an interest in land under the Mortmain Act (9 Geo. II. c. 36), and also under the Statute of Frauds, and, not being an express trust, is barred after twelve years by the Statute of Limitations.

Locke King's Amendment Act (30 & 31 Vict. c. 69) provided that the term "mortgage" should include a lien for unpaid purchase-money upon lands purchased by a testator; and the Further Amendment Act of 40 & 41 Vict. c. 34, made the same provision in case of a purchaser dying intestate.

Where the property upon which the vendor has a lien is again sold by the purchaser, a conflict of claims arises between the original vendor and the subsequent purchaser.

Notice.

The question of notice is here of the greatest importance.

A vendor's lien will not prevail against a subsequent purchaser for value *without notice*, who has got the legal estate, but it will prevail against a subsequent purchaser for value, who has acquired the legal estate *with notice*, and even if the purchaser is without notice, it will prevail if the legal estate is outstanding; in such a case, the equities of the original vendor and the subsequent pur-

chaser are equal, and the maxim, "*Qui prior est tempore potior est jure*," applies.

It has not unfrequently happened, however, that a vendor whose lien would have been enforced where the legal estate was outstanding, has lost it by negligence; and where this occurs, the subsequent purchaser is safe, as in *Rice* v. *Rice* (2 Drew. 73), where a vendor carelessly allowed a purchaser of leasehold property to take away the deed of assignment, endorsed with the receipt for the purchase-money in full, though in fact it was unpaid, and the purchaser effected an equitable mortgage upon the property by a deposit of the deeds; and it was held that the right of the equitable mortgagees was good against the vendor's lien, on the ground of the negligence of the latter.

A subsequent purchaser is deemed to have notice of a previous claim, if he neglects to inquire for the title deeds, or is contented with a palpably insufficient excuse for their non-production. A vendor is held to waive his lien if he accepts other security for his claim, provided it is clear the taking of the other security was intended as a substitute for his lien.

A purchaser who has prematurely paid his purchase-money, has a lien upon the estate for the amount, the same rules being applicable as in the converse case. A lien is also created where lands are devised charged with the payments of debts or legacies.

CHAPTER VIII.

PENALTIES AND FORFEITURES.

Relief in equity—when.

WHEN the performance of some act or covenant is secured by the attachment of a penalty or forfeiture in the event of non-performance, equity regards fulfilment of the act or covenant as the substantial object of the agreement, and will grant relief by decreeing compensation in proportion to the amount of damage sustained by the breach or non-performance, instead of enforcing the full penalty or forfeiture. If the damages, however, from the nature of the case are unascertainable, and it is consequently difficult to award compensation, the covenantor will generally be held strictly to his terms.

Cannot avoid the Act.

On the other hand, it is not competent for a party to avoid his contract by merely paying the penalty. As was remarked by Lord St. Leonards in the case of

FRENCH *v.* **MACALE,**
[2 Drew. & War. 269],

the general rule of equity is, "that if a thing be agreed to be done, though there is a penalty annexed to its performance, yet the very thing must be done."

Liquidated damages.

But if it appears to be the clear intention of the parties that the covenantor is to have his choice of two alternatives, a certain sum of money to be paid in the one event, and an additional sum to be paid in the other, whether expressed to be as a penalty or as liquidated damages, equity will regard the additional sum named as liquidated and ascertained damages, and enforce full payment.

The illustration given by Lord St. Leonards, in some further remarks on the above case, shows the distinction very clearly. He says, "If a man covenant to abstain from doing a certain act, and agree that if he do it he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act; he cannot elect to break his engagement by paying for his violation of the contract.

"The question for the Court to ascertain is, whether the party is restricted by covenant from doing the particular act, although, if he do it, a payment is reserved; or whether, according to the true construction of the contract, its meaning is, that the one party shall have a right to do the act on payment of what is agreed upon as an equivalent. If a man let meadow land for two guineas an acre, and the contract is, that if the tenant choose to employ it in tillage, he may do so, paying an additional rent of two guineas an acre, no doubt this is a perfectly good and unobjectionable contract; the breaking up the land is not inconsistent with the contract, which provides, that in case the act is done the landlord is to receive an increased rent."

The mere fact of the sum named as payable in a certain event, or events, being described as a penalty, or as liquidated damages, is not conclusive. The Court reserves the right of placing its own construction upon the terms of the contract, and the general tendency hitherto, in cases of doubt, has been to construe the sum named as a penalty and give relief, which will not be granted if the Court considers that the sum can fairly be regarded as liquidated damages. The following rules of construction have been deduced from the authorities on the point.

A sum conditioned to be paid in a certain event or upon certain contingencies is treated as a penalty.

1. Where the payment of a smaller sum is secured by a larger. *Astley* v. *Weldon*, 2 B. & P. 350—354.

2. Where the sum named is to become payable upon the breach of all or any of the covenants or stipulations mentioned in the deed; and the sum is, in fact, too large a compensation in some instances, and too small in others.

The case which established this principle is

KEMBLE *v.* FARREN,
[6 Bing. 141],

the facts being, that the defendant had agreed to act as principal comedian at Covent Garden Theatre for some time, and was to receive 3*l.* 6*s.* 8*d.* every evening the theatre was open, and other stipulations also; it was also agreed that in the event of the defendant refusing to fulfil the contract, or any part thereof, or any stipulation contained in it, he should pay to the plaintiff the sum of 1,000*l.*, expressly declared to be as liquidated damages.

This case, however, as well as *Astley* v. *Weldon*, though not overruled, was severely criticized by Jessel, M. R., in

WALLIS *v.* SMITH,
[21 Ch. D. 243],

where the payment of a sum expressed to be payable as liquidated damages was enforced as such, upon the following principle:—

A sum conditioned as before to be paid will be treated as liquidated damages—

Where the contract contains one or more stipulations, and the damages arising from the breach thereof cannot be ascertained.

It has never been doubted but that where the sum becomes payable in one event only, and the damages cannot be ascertained upon a breach, the sum will be considered as liquidated damages.

The same rules as above were applicable to forfeitures for breaches of covenant, except as between landlords and tenants, in which cases equity entertained only a limited

jurisdiction. But the Conveyancing Act of 1881 has now given the Court power to relieve, upon equitable terms, against forfeitures for breach of any covenant contained in a lease or underlease, except in the case of—

1. A covenant not to assign or underlet:
2. A condition of forfeiture upon bankruptcy or execution:
3. A covenant for inspection in a mining lease.
4. Non-payment of rent—which is provided for by other statutes.

Chapter IX.

SURETYSHIP.

The relief given to sureties was always of a far more ample character at equity than at common law, and also more accessible. Equitable rules now prevail in all Courts, but in all complicated cases of suretyship, equity still retains a practically exclusive jurisdiction.

When binding.

It is an established principle of equity, that a suretyship will not be binding where the creditor has been wanting in good faith. So if by any concealment of material facts, or other unfair means of which the creditor has knowledge, a surety has been induced to act, he will be freed from all liability; but there is no obligation upon the creditor to inform the intending surety, unless inquiry is made of him, as to all the facts within his knowledge which might render the acceptance of the suretyship more prejudicial than was supposed.

Discharge.

A surety is also discharged from his liability by a creditor releasing or compounding with the principal debtor, for otherwise the creditor could sue the surety, who in his turn could sue his principal, and the release or composition would have no effect. If, however, the surety has concurred, the case is different.

The fact of a creditor giving further time to the principal debtor, for the payment of his debt, is sufficient of itself to discharge the surety, provided that his rights are prejudicially affected by the arrangement, and he is not a consenting party; so, too, an agreement between the creditor and the principal debtor to give time to the surety,

effects his discharge, unless he reserves his remedy against the surety.

Variations from the original agreement, if material, generally operate to discharge sureties.

Co-sureties.

The liabilities of co-sureties to contribute proportionately was established in

DERING *v.* EARL OF WINCHELSEA,

[1 Cox, 318],

where three sureties having become jointly and severally liable for one and the same sum, and the whole being recovered against one of them, it was held that the other two must contribute equally.

This principle, however, is not applicable, where the suretyships are in respect of distinct transactions, even though the same sum is secured by each, and it may be excluded by express agreement.

Upon payment of a debt by a surety, he is entitled to all securities in the possession of the creditor, and if a creditor has lost them, or for some reason they are unavailable, the surety is discharged *pro tanto*.

If one of several sureties becomes insolvent, and the entire debt is recovered against another, the surety who has paid can recover proportionately from the other or others who have not. Contribution can also be enforced against the estate of a deceased surety.

Chapter X.

MARRIED WOMEN.

By the Married Women's Property Act, 1882, the tendency of modern legislation on this subject has attained its limit, and the law as regards married women is totally revolutionized. Through this enactment the beneficial jurisdiction of equity is restricted to cases where rights and interests have been acquired before it came into operation. In course of years the necessity of equitable interference on behalf of married women will arrive at a vanishing point, and the elaborate devices which the ingenuity of lawyers in byegone days contrived and framed for their protection, will possess for the student an interest purely historical. At common law, a woman upon her marriage became entirely merged in her husband. By the "*jus mariti*" the husband became entitled to the rents and profits of his wife's real estate during the coverture, to her chattels personal in possession absolutely, and to her choses in action, provided he reduced them into possession during the coverture, or as her administrator after her death.

It is obvious that under such a system of law, a married woman might experience considerable hardship, and so an equitable instrument for her protection was devised in the form of "separate use." The husband had no power whatever over property which his wife enjoyed to her separate use. It arose in several ways, by— **Separate estate.**

1. Express limitation to separate use.
2. Ante-nuptial agreement, and sometimes even by post-nuptial agreement.

3. Gifts by a stranger to a married woman.
4. The earnings of a wife derived from carrying on a separate trade.

Though very beneficial as far as it had power to operate, the separate use clause did not entirely prohibit the abuse it was directed against. Its purport was liable to be defeated by the husband's influence, and to obviate the difficulty, a fresh remedy was devised by adeeming the wife's power of anticipating her income.

Restraint on anticipation.

This was called a "restraint on anticipation," the effect of which was to deprive the wife of all power of dealing with her income, until the money was actually paid into her hands. Further than this equity could not go.

In the case of

TULLETT *v.* ARMSTRONG,

[1 Beav. 1],

it was established, *inter alia*, that the separate estate clause, whether with or without the restraint on anticipation, existed during coverture only, and that the restraint has no existence independently of the separate use. Another creature of equity, specially framed for protecting the interests of married women, was called the wife's "equity to a settlement."

Equity to a settlement.

When it became necessary for the husband or his assignee to seek the aid of a Court of Equity for the purpose of obtaining that which a Court of common law would have granted but for its want of jurisdiction, equity made terms, and on the principle that "he who seeks equity must do equity," granted its aid only upon the condition that the wife's interests were provided for; *e.g.* a wife was held to be entitled to a settlement where a mortgagee of a wife's equitable interest in leaseholds, the husband and wife being mortgagors, sought foreclosure. It would, however, have been otherwise, had the legal interest been mortgaged, or if the husband's interest had been partial only.

A wife's pin-money, which is an annual allowance to her for personal expenses, bears a strong resemblance to her separate use estate. She can only claim, as a general rule, one year's arrears upon her husband's death. Paraphernalia include ornaments, &c., given to the wife to adorn her person; she cannot dispose of them during her husband's life, nor can he dispose of them by will during her life, and they are subject to his debts. Pin-money.

The Married Women's Property Acts, 1870 and 1874, have conferred considerable benefits upon married women. By sect. 7 of the Act, 1870, the separate use clause attached to all sums of money to which a married woman was entitled after the passing of the Act *ab intestato* not exceeding 200*l.*, and to the rents and profits of realty to which she was similarly entitled; and by the Act, 1874, a husband was declared to be liable for his wife's debts to the extent of the assets which he received with his wife under the Act. By the Act, 1882, before referred to (sect. 2), with regard to women married after the passing of the Act, all property belonging to a woman at her marriage, or afterwards acquired by or devolving upon her, including earnings, is to be held by her as a *feme sole*, subject to the provisions of her settlement, if any (sect. 19); and by sect. 5, with regard to women married before the Act, all property which falls into possession (*Boynton* v. *Collins*, W. N. 1884, p. 171) on or after the 1st day of January, 1883, shall be their separate property. By sect. 19, nothing contained in this Act is to interfere with the restraint on anticipation; but no restriction on anticipation contained in a settlement of a woman's own property to be made by herself shall avail against debts contracted by her before marriage, and no settlement is to have any greater validity against the creditors of such a woman than a similar settlement, if made by a man, would have against his creditors.

CHAPTER XI.

INFANTS AND LUNATICS.

SECT. 1.—INFANTS.

Jurisdiction.

THE Court of Chancery derives its jurisdiction, in respect of infants and their property, from the Crown, which, in its capacity as "*parens patriæ*," is invested with the right, entailing a corresponding duty, to protect the interests of those who have no lawful protector.

Ward of Court.

An infant becomes a ward of Court, even during the lifetime of its father or other guardian, whenever an action is commenced or a petition presented (under the Custody of Infants Act, 1873 (36 & 37 Vict. c. 12)) affecting the person or property of the infant, or even where an order for maintenance had been made at Chambers, provided that the infant is possessed of property over which the Court can exercise control; for otherwise the duties of the Court would be somewhat onerous. As Lord Eldon said, "The Court cannot take upon itself the maintenance of all the children in the kingdom."

The effect of an infant becoming a ward in Chancery is to give the Court full power over its person and property during minority, and, in the case of a female infant, the Court practically exercises control over the property after the attainment of majority, by directing a proper settlement to be made.

Guardians. Father.

The natural guardian of an infant is the father, and it will require strong grounds, such as cruel treatment, notorious immorality, insolvency, or in fact any course of conduct on the part of the father which clearly tends to prejudicially affect the person or estate of the infant, in order to induce the Court to interfere with his guardianship.

The Court does not actually possess the power to deprive the father of his legal right as guardian, but it attains the same end by appointing another person to act as such, for the purpose of protecting the infant's interests; and by 36 Vict. c. 12, has power, under such circumstances as have been mentioned, to grant to the mother custody of an infant under the age of sixteen, to the exclusion of the father's right, where such course appears to be for the infant's benefit.

Testamentary guardian.

A father may appoint a guardian for his infant children by deed or will; if he is himself a minor he may appoint a guardian by deed, though not by will. This power was given by the Statute of Tenures (12 Car. II. c. 24). Guardians so appointed are called testamentary guardians; the Court does not require such strong circumstances before it will interfere in their case as where the guardian is the father. In the absence of any appointment, upon the death of the father, the mother is the natural guardian of her infant children. She is also the guardian of her illegitimate children (*Re Carey, R.* v. *Nash*, 10 Q. B. D. 454). Where more than one guardian is appointed by will, the office passes to the survivor. This was decided in the leading case of *Eyre* v. *Countess of Shaftesbury* (2 P. Wms. 103), in which the entire jurisdiction of the Court over infants was elaborately stated.

Mother.

A testamentary guardian may disclaim the office before, but not after, he has acted in it.

Person in loco parentis.

Under some circumstances a stranger may appoint a guardian to an infant, *e. g.*, if the father has waived his right, and allowed the stranger to place himself "*in loco parentis*," by providing for its education and maintenance.

Powers of guardian. Education.

A guardian has the right to exercise his own judgment in reference to the education of the ward; but the Court is very averse to a course of treatment which might tend to change the religion in which the infant was brought up. A child is to be brought up in its father's religion

if its father has left no directions upon the subject (*Re Agar Ellis*, 10 Ch. D. 19), and any ante-nuptial promise by him as to bringing children up in any particular religion is nugatory (*Re Agar Ellis*, 10 Ch. D. 19).

If it is desired by the guardian to take the ward out of the jurisdiction of the Court, security will be required of him as a guarantee for its safety and protection.

Property. Except under exceptional circumstances, and where it is manifestly for the infant's benefit, a guardian is not permitted to change the character of the infant's property; but where it is permitted, the representatives of the infant, in the event of its death before twenty-one, take as they would have taken had the nature of the property not been affected; but after the infant has attained majority, the property will devolve according to its actual character at the time of the infant's death.

Marriage. The Court exercises extreme vigilance with respect to the marriage of a ward, whether male or female, and visits any person who marries one, and every one conniving at such a marriage, with the penalties of contempt of Court.

To prevent the possibility of such a marriage, a guardian, upon appointment by the Court, is generally required to enter into recognizances, which will be forfeited if it appears that the marriage took place owing to his negligence.

Upon the marriage of a female ward the Court generally refers it to chambers, for the purpose of ascertaining whether the marriage is a suitable one, and of effecting a proper settlement; this reference being usually made upon petition, the nature of which will depend, in large measure, upon the circumstances of each case. If a ward has married without consent, the Court will compel the husband to execute a suitable settlement.

Before the Infants' Marriage Settlement Act (18 & 19 Vict. c. 43), infants could not make valid settlements upon their marriage, nor could the Court give validity to such

settlements; but by that Act infants, not being under twenty years if male, and not under seventeen years if female, could make binding settlements of any property they possessed upon their marriage. This Act applies to post-nuptial settlements (*Brooking* v. *Brooking*, *Re Wood*, Weekly Notes, 1883).

Maintenance.

A father, and since the Married Women's Property Acts, 1870 and 1882 the wife, if possessed of separate estate, in the event of the husband's inability, is bound to maintain his or her infant children; and no maintenance will be allowed to the guardian, whether father or mother, except in cases where the means of the guardian are not adequate, for the purpose of providing a position and education for the infant commensurate with its expected fortune. Also, where there is a contract on marriage, amounting to a trust, that a particular property shall be applied for maintenance and education, that property shall be applied without reference to the ability of the father to maintain them. A testamentary or other guardian is not under any such obligation, and maintenance will always be allowed to them, on behalf of the infant, in proportion to its fortune.

Sect. 2.—Lunatics and Persons of Unsound Mind.

Historically the Crown has, by its prerogative, the care and custody of lunatics, their estates being sources of revenue. On the appointment of the Lords Justices, in 1851, the care of lunatics was delegated to them; this was continued under the Lunacy Regulation Act, 1853, and the Judicature Act, 1875, s. 7, gives it to such judges as may be entrusted, by sign manual, with the care of lunatics.

Unsoundness of mind alone gives the Court of Chancery no jurisdiction, it merely has it where it would have jurisdiction in the case of persons of sound mind; as, when a person becomes a ward of Court.

When, on inquisition held at the direction of the Court in Lunacy, a verdict has been found and a committee appointed, such committee becomes an officer of Court, and a delegate of the prerogative of the Crown; and the Court has no jurisdiction after that, except by the direction of the Court in Lunacy (*Beall* v. *Smith*, L. R., 9 Ch. 85). The function of the Court in Lunacy, as to the lunatic's property, is purely administrative, his interests being alone consulted; an allowance to his near relatives being sometimes given, if indirectly benefiting the lunatic himself (*Re Weld*, 20 Ch. D. 451). And any conversion of his property is allowed on only the above ground, his representatives taking it in the character in which it is found.

Chapter XII.

ELECTION, SATISFACTION AND PERFORMANCE.

Sect. 1.—Election.

NOYS *v.* **MORDAUNT.**

[1 W. & T. Cas.].

Principle.

If, by one and the same instrument, A. gives property of his own to B., and then purports to give to C. certain property belonging to B., B. is put to his election, *i. e.*, he can either retain his own property, in which case he cannot take the gift intended for him, or he may take the gift, in which case he must surrender his own property to C.

The above illustration is based upon the assumption that both gifts are of equal value, but it does not follow that B., even if he elects against the instrument (which is the expression in use when a person decides to retain his own property), will lose all benefit under the instrument, for it is now well established that compensation, and not forfeiture, is the rule.

Hence, if A., by his will, leaves B. a legacy of 1,000*l.*, and leaves C. property belonging to B., the value of which is 500*l.*, B., if he elects against the will, still gets the 1,000*l.*, though he must pay to C. the 500*l.* intended for him.

Conditions.

The two principal conditions, which must be complied with before a case for election can arise, are—

1. There must clearly be an intention on the testator's part to dispose of property not his own.
2. There must be some property of his own available for the purpose of compensation.

Where there is a doubt as to whether the testator intended to devise another person's property, and by so doing, to put him to his election, equity leans against such a construction: as where a testator devised property, in which he had only a partial interest, to a third person, and left a legacy to the person who had an interest with him in the property devised; it was held that the devise only extended to the testator's interest in the property, not to the whole; and, consequently, no case of election arose. The rule, however, does not hold good where a contrary intention is manifest. Election is often implied from the conduct of a party, but the circumstances must be very strong, and it is necessary to prove knowledge of the right to elect.

Sect. 2.—Satisfaction.

Definition. The equitable doctrine of satisfaction may be defined as being the extinction of a prior obligation by a subsequent gift, but the presumption that satisfaction was intended, does not arise in the presence of a contrary intention.

It is not necessary for the obligation imposed on the donor to be in the nature of a debt, the principle applies equally if the previous obligation is not enforcible, but only of a moral character.

Hence the subject is divisible into cases where—

1. The obligation was a legal one.
2. The obligation was only moral.

Satisfaction of debts by legacies.

TALBOT *v.* EARL OF SHREWSBURY.

[2 W. & T. Cas. 352.]

Satisfaction of debts by legacies. The principle upon which this class of cases has been decided is *debitor non præsumitur donare*, but though the presumption is such, very slight circumstances are considered sufficient to rebut it.

In the case mentioned, it was held that a legacy left by

a debtor to his creditor was intended to be only in satisfaction if it was equal to, or greater in amount than the debt. Consequently, if equal to the debt, the creditor derives no benefit under the will beyond the payment of what is due to him.

The presumption of satisfaction is, however, rebutted in any of the following cases:—

1. If the legacy is less in amount than the debt.
2. If it is a contingent legacy.
3. If it is of a different character to the debt; thus, a devise of land does not extinguish a pecuniary debt.
4. If the legacy is a residuary one, for the value of it is uncertain.

In some cases, moreover, the character of the debt operates to rebut the presumption, as where the debt is contracted after the date of the will, in which case there can be no intention, or where there is a direction in the will to pay debts, or the amount of the debt is uncertain.

Satisfaction of claims other than debts by subsequent donations.

Legacies by portions.

Where a portion is advanced by anyone standing *in loco parentis* to the donee, after having previously bequeathed a legacy to him or her by will, then, unless the legacy is expressed to be given for some particular purpose, the advancement of the portion is considered to have satisfied the legacy; though if the portion be less than the legacy, it is only satisfied *pro tanto*.

The principle only applies where the donor is *in loco parentis*, and the relationship is not presumed in a gift by a father to his natural child; this being, therefore, a case in which an illegitimate child stands in a better position than a legitimate one.

Equity leans strongly against double portions, so strongly indeed that satisfaction is presumed where a

father advances a portion, after bequeathing a legacy to his only child, and upon his death the legacy is adeemed.

The advancement, however, must be clearly intended as a portion, *i. e.*, a gift made with the object of creating some provision for the donee, as a settlement on marriage, or a sum of money advanced to purchase a business; for mere occasional gifts of no great value in no way operate to satisfy a legacy.

Portions by legacies.

The principle holds good equally in the converse case, where portions are considered to be satisfied by subsequent legacies, excepting that here, the portionist having a vested right, and being a *quasi* purchaser as it were, can at the utmost be put to his election.

The leading case on this branch of cases is

THYNNE *v.* EARL OF GLENGALL,

[2 H. L. 131],

where a covenant to make a provision for a daughter was held to be satisfied by a subsequent bequest.

Repetition of legacies.

Legacies by legacies.

Legacies are frequently held to be satisfied by other legacies. In these cases the intention of the testator, as far as it can be gathered, is of the greatest importance in determining the question of satisfaction. It is obvious that if the same thing is specifically bequeathed twice, the second legacy is repetitive; but the case is different where the legacy is not specific.

If the legacies are equal in amount and by the same instrument, the second is considered repetitive; but if of unequal amounts, they are regarded as cumulative, and the legatee is entitled to both.

If the legacies are given by different instruments, whether they are equal or unequal in amount, they are considered cumulative in every case, unless, being equal in amount, the same motive is expressed for bequeathing them in either case.

Sect. 3.—Performance.

When a person covenants to do an act and does another similar, he is presumed to have intended to perform his covenant when he does the other. This is the doctrine of performance. It resembles satisfaction, because it rests on the same maxim. Equity imputes an intention to fulfil an obligation, but it differs from it in that—(i.) in satisfaction the thing done is a substitute for the thing engaged to be done, whereas in performance the identical thing is considered to be done; (ii.) in satisfaction the doctrine will not hold where the thing substituted is less beneficial, while in performance it will be a performance *pro tanto;* (iii.) where there is no performance, it is immaterial if the amount is greater.

The illustrations of this doctrine occur—

1. By act of party—as,

Where there is a covenant to purchase and settle, and a different purchase is made, but no settlement, as in

LECHMERE *v.* EARL OF CARLISLE,
[3 P. Wms. 211],

where Lord Lechmere covenanted upon his marriage to invest 30,000*l.* in the purchase of freehold property in possession in the south of England, with the consent of trustees, one of whom was Lord Carlisle, to be settled, after jointuring Lady Lechmere, upon himself for life, with remainder to his first and other sons in tail. Lord Lechmere, after his marriage, purchased some estates in fee, of about one-third the value covenanted for, and also purchased other freehold property not in possession, all the purchases being effected without the consent of the trustees. Lord Lechmere then died, and upon a bill being filed by his heir for specific performance of the covenant, it was held on appeal that the purchase of the freehold property in possession was a partial performance of the covenant, and that the heir could only claim to have so much of the

How differing from satisfaction: i. By act of party.

covenantor's personal estate laid out in accordance with the provisions of the covenant, as would amount, together with the price of the lands already purchased, to the sum of 30,000*l.*

From this case two rules can be deduced—

1. The consent of trustees is not essential.

2. Performance is not ascribed to the purchase of property which does not follow the description of that covenanted to be purchased.

ii. By operation of law.

2. By operation of law—as in

BLANDY *v.* WIDMORE,

[2 W. & T. Cas. 391],

Covenant to pay money—death intestate. i. At or before the period.

where a man covenanted before marriage to leave his wife a certain sum by will, and died intestate. The widow's share under the Statute of Distribution was more than she would have received had the terms of the covenant been complied with. It was held that the covenant had been performed by the operation of law, and the widow had no claim upon the administrators of her husband. If, on the other hand, her share upon her husband's intestacy had been less than the sum she was entitled to upon the covenant, the performance would have been *pro tanto* only, and she could have claimed proportionally.

ii. Death after the period.

But if the covenant is to settle in a given period, and the death intestate occurs after that period, as in *Oliver* v. *Buckland*, 3 Atk. 420, the amount will be a debt, and the share received under the intestacy will not be considered a performance, even though greater (as it would have been had the principles of the doctrine of satisfaction applied).

PART II.

WHERE THE JURISDICTION RESTS ON THE DISTINCTIVE PROCEDURE OF EQUITY.

CHAPTER I.

THE ADMINISTRATION OF ASSETS.

SECT. 1.—ADMINISTRATION GENERALLY.

Origin of equitable jurisdiction.

THE jurisdiction over the administration of the personal estates of deceased persons was originally vested in the ecclesiastical, and that of real estates in the common law Courts. But neither of these Courts possessed adequate machinery for that purpose; and consequently equity, which could alone compel discovery, examine properly into accounts, and readily enforce its decrees, became at an early time the favourite tribunal for those functions; and in the time of Elizabeth the right of a creditor to sue in Chancery was considered settled.

The Court never did, and does not now, profess to interfere with the appointment of the personal representative, which is the province of the Probate Division; and the rules which existed for the payment of debts, though diametrically opposed to the principles of equity, were left untouched by her, for she could scarcely otherwise have held her ground had she compelled creditors to transfer the adjudication of their debts to her tribunal (for a Chancery decree involved payment of all the debts, and thus other creditors were obliged to come in and establish

their claims), and at the same time deprived them of advantages they would have gained had they been left to pursue their original remedies. But in the case of assets which had no existence at the common law, and were called equitable, she pursued her distinctive principles.

Assets. **Assets** consist of all property of a deceased person available for the payment of his debts. They are—

Legal. 1. **Legal**—being that property to which the personal representative becomes entitled **virtute officii**, and which he could recover as such, and where the creditor's remedy against him lies in a court of law.

Equitable. 2. **Equitable**—that property which is only available to pay debts through a decree of equity.

It is immaterial whether the interest itself is of a legal or equitable nature. Thus, the equity of redemption of a leasehold, though a mere creation of equity, is legal assets, for the personal representative is the only person who can redeem.

Estates devised upon trust to pay debts, or charged with the payment of debts, and property over which the testator had a general power of appointment which he has exercised by his will, (and which equity, on the principle that a man should be just before he is generous, takes from the appointee, if the testator dies in debt, on the ground of its being a defective execution of a power, are equitable assets).

Equity has always endeavoured to spell out of wills an intention to charge the realty, so as to make it equitable assets. It has been held that a charge for debts to be paid out of rents and profits will effect a charge on the corpus.

A general direction to pay debts, although the realty is not devised or mentioned, amounts to a charge, unless—

1. A particular fund is specified after such general direction, there being no subsequent charge on the residuary personalty;

2. The debts are directed to be paid by the executors, it being presumed that payment is to be from the assets (the personalty) which come to them for that purpose, unless—

(i.) The charge is a mere form, and it is shown that there is no intention to charge the realty;

(ii.) The executors are, at the same time, devisees of the realty. But the land will not even then be considered charged if, from the nature of the devise, a contrary intention can be inferred, as where—

(1.) The devise was to one of several executors (*Warren* v. *Davies*, 2 M. & K. 49);

(2.) The executors take in unequal shares (*Harris* v. *Watkins*, Kay, 438);

(3.) Or only a limited interest (*Cook* v. *Dawson*, 29 Beav. 123);

(4.) Or where the devise is only part of the realty (*Bailey* v. *Bailey*, 12 Ch. D. 268).

Order of application of assets.

The creditor's rights now extend to the whole of the assets, and are unprejudiced by any claims which the different classes of beneficiaries may have inter se. Assets of different kinds are applied in regular order to pay debts, and although a creditor, being entitled to immediate payment, need not wait the working out of so gradual a process, yet the right order, if disturbed for a time, can be readjusted by what is called **marshalling.**

It was established in

Order of application of assets.

ANCASTER *v.* **MAYER,**

[1 W. & T. Cas.],

1. that the general personalty was the primary fund for the payment of debts, unless exempted by express words, or an indication of a manifestly contrary intention, which parol evidence is not admissible to show.

2. Realty expressly devised in trust to pay debts being equitable assets.

3. Realty descended to the heir.

4. Realty and personalty charged with the payment of debts, and devised, bequeathed or suffered to descend, subject to the charge, contribute rateably, and are equitable assets. If realty is devised and the devise lapses to the heir, it will still rank in this place, and not in Class 3, *supra*.

5. The property which the executor has set apart for the payment of general pecuniary legacies, and also demonstrative legacies, the fund out of which they are directed to be paid failing.

6. Specific (α) devises and (β) legacies, (γ) the fund out of which demonstrative legacies are to be paid, and (δ) residuary devises (*Lancefield* v. *Iggulden*, 10 Ch. 136).

7. The widow's paraphernalia.

8. Realty and personalty over which the testator had a general power of appointment which he has exercised by his will. This is treated as assets in equity, because, by the exercise of the power, the donee has virtually made it his own, and the appointees, therefore, really only take by bounty a specific part of the testator's general assets.

Except in the case of estates devised on trust to pay debts (where the trustee is bound to account for all he receives), the mesne rents and profits of realty which accrued between the testator's death and the actual administration cannot be resorted to for payment of debts until the corpus of the property has been exhausted.

Lands originally were not liable for the payment of debts, and it is comparatively recently (1833) that they have been made assets in equity for the payment of special (where the heir was not bound) and simple contracts. Until administration decree, the debt is no charge on the land. If the real representative alienates it before action brought, his alienee is safe; though, if he does, he still

remains personally liable. It has been decided that his bankruptcy does not amount to an alienation, his trustee in bankruptcy merely standing in his place (*Ex parte Morton*, 5 Ves. 449); nor does a judgment entered up against him for his own debt bind it, such a judgment being only intended to operate as a charge on those lands of the debtor of which he had a right to deem himself beneficial owner (*Kinderley* v. *Jervis*, 22 Beav. 1); but his depositing the title-deeds by way of equitable mortgage does, and gives the mortgagee a prior claim (*Ex parte Baine*, 1 Mont. D. & De G. 492).

Order of payment of debts.

Where a person dies owing different descriptions of debts, the following is the order of paying them:—

1. Record and specialty crown debts.

2. Debts to which particular statutes give priority—*e.g.*, poor-rates, income-tax.

3. Registered judgments, and judgments not registered, if recovered against the personal representatives of the deceased, the reason for the distinction being, that if a judgment against the deceased was not registered, the personal representative might not know of its existence, and so pay a debt of inferior degree first. Decrees of Courts of Equity stand on the same footing, provided they direct the payment of money. Thus, a decree for an account, and for payment of what may ultimately become due, would not, because nothing might become payable (*Chadwick* v. *Holt*, 8 D., M. & G. 584); nor for an order for payment into Court to the credit of any cause, because that would not decide any beneficial right (*Ward* v. *Shakeshaft*, 1 Dr. & Sm. 269); nor a chief clerk's certificate finding a sum due, that not being an order for payment (*Earl of Mansfield* v. *Ogle*, 4 De G. & J. 38).

4. Statutes and recognizances.

5. Specialty and simple contract debts, and unregistered judgments against the deceased.

6. Voluntary bonds.

Retainer. The executor, the executor of the executor, if the claim has been made (*Wilson* v. *Coxcell*, 23 Ch. D. 764), has a right of **retainer** out of **legal assets**—that is, of paying his own debt, it being immaterial whether that debt is legal or equitable (*Frank* v. *Cooper*, 4 Ves. 753), before any others of equal degree, and also a right of **preference**—paying one creditor of equal degree before another.

But he cannot retain or prefer a simple contract debt against a specialty debt; for *Crowder* v. *Stewart* (16 Ch. D. 368) has decided that the right of retainer is unaffected by Hinde Palmer's Act (32 & 33 Vict. c. 46), though he may against a contingent specialty, as an indemnity bond; and statute-barred debts stand on the same footing in this respect as ordinary debts. This right of retainer extends, as above stated, to the executor of an executor, also to administrators, administrators *durante absentiâ*, administrators *durante minore* (they being able to retain their own debts and those of the deceased, the infant, &c.), a partner being executor for partnership debts, and a husband being executor for the debts of the wife.

The right is lost by an administration decree, or the appointment of a receiver, or an injunction, and it cannot be exercised to the prejudice of a co-executor.

ALDRICH *v.* **COOPER,**

[1 W. & T. Cas.].

Marshalling of assets. When a creditor who can resort to several funds for the payment of his debt has resource to that fund which, as between himself and some other creditor, is not primarily liable to pay it, or is the only fund to which such other creditor can resort, the right of that person to be replaced in the position he would have occupied if the assets had been applied in their strict order of priority, is termed marshalling of assets. Thus, if a creditor takes the property set apart for a pecuniary legatee by exhausting the general personalty, the pecuniary legatee may receive

satisfaction out of the real estate descended, and any realty charged or devised for the payment of debts.

Assets are never marshalled in favour of a charity; so that if A. gives to a charity a legacy payable out of a mixed fund, consisting of realty and pure and impure personalty, the charity cannot throw the legacy exclusively on the pure personalty—the only fund out of which, owing to the Mortmain Acts, it can be paid; but it will fail in the proportion which the realty and impure personalty bear to the pure personalty.

Marshalling of securities.

If one person has two funds to resort to, and another has only one, the former shall not disappoint the latter by depriving him of his only resource. Therefore if Dale and Blackacre are mortgaged to X., and afterwards Dale to Y., the Court will direct X. to take his satisfaction, firstly, out of Blackacre, so as to leave Dale for Y., notice being immaterial. But there will be no marshalling if prejudicial to third parties; thus, suppose in the above both estates are mortgaged to Z. without notice of the second mortgage, the securities will not be marshalled against Z.,—Z. having no notice of the second mortgage.

(This, however, hardly touches administration, being the rights of creditors of living people.)

Contribution.

If two different estates are charged with the payment of debts, but devised to different persons, each will contribute rateably to the payment of debts.

Insolvent estates.

In the administration of the insolvent estates of persons dying after the 1st November, 1875, and in the winding-up of insolvent companies, the bankruptcy rules are to prevail as to—

1. The rights of secured and unsecured creditors.

A secured creditor is one who holds any mortgage, charge or lien on the estate as security for a debt due—*e. g.*, a judgment creditor who has seized under a *fi. fa.* or an *elegit*, or obtained an order for a receiver (*Smith* v.

Cowell, 50 L. J. 38, App.), the effect of which is, that a secured creditor has the option of (1) realising, or applying to have his security realised; or (2) compelling the trustee to buy his security by resting on it.

2. The debts and liabilities provable.

3. The valuation of annuities and future and contingent liabilities.

There have been several decisions of a conflicting nature as to the true interpretation of these rules, whether they are to receive a liberal or a narrow construction, as to the introduction of the bankruptcy rules. It has been held, that it does not abolish the priority of judgment and other debts (*Re Maggi, Winehouse* v. *Winehouse*, 20 Ch. D. 545), nor interfere with the right of retainer of the executor (*Richmond* v. *White*, 12 Ch. D. 361). Its principal effect has been to abolish the rule in *Mason* v. *Bogg* (2 My. & Cr. 443), that in administration a secured creditor may prove for his whole debt, without abandoning his security, thus favouring the general body of creditors to the detriment of secured creditors. Now, however, the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125, allows any creditor of a deceased person, whose debt would have been sufficient to support a bankruptcy petition, to petition for the administration of the deceased's estate. An order cannot be made until two months after the grant of probate or letters of administration, unless—

1. With the concurrence of the personal representative.
2. The petitioner proves that the debtor has committed an act of bankruptcy within three months of his death.

A petition for administration shall not be presented after proceedings for administration have been taken in any other Court of justice; but they can be transferred there with the consent of the Court. Notice of the presentation to the personal representative will act as notice of an act

of bankruptcy, and prevent his making any binding payment. Also, under sect. 122, the County Court will make an administration order where the whole debts are not over 50*l.* Debts barred by the Statutes of Limitation are not provable in bankruptcy.

Statutes of Limitation.

Claims of creditors are barred by the Statutes of Limitation. A simple contract creditor must sue in six years (21 Jac. I. c. 16), and a specialty creditor in twenty years (3 & 4 Will. IV. c. 42) from the time the debt was contracted, unless there is some written promise, or acknowledgment, or part payment, or disability to sue—as infancy, lunacy, or absence beyond the seas of the defendant—then from six and twenty years respectively from such time of payment, &c., or termination of the disability.

Actions to recover land must be brought within twelve years from the time the right accrued, subject to extension by acknowledgment, &c. as above; in the event of disability, a further period of six years is allowed from the termination of such disability, but thirty years is the extreme limit (3 & 4 Will. IV. c. 27; 37 & 38 Vict. c. 57).

How they agree.

These Statutes of Limitation all agree in that—

(1) They will not begin to run until there is a person to sue, a person to be sued, and a subject-matter to be sued for; thus, if the defendant is abroad when the right to sue accrues, the period will not commence till his return.

(2) When they have once began to run, nothing can stop them, not even the closure of the Courts in time of war (*Beckford* v. *Wade*, 17 Ves. 93).

How they differ.

They differ—

1. As to the periods.

2. Those relating to land bar the right, while the others bar the remedy merely; therefore, no acknowledgment will revive the title of a claimant to land after the statutory period has expired. The remedy alone being barred means that the right exists, but it is not enforceable by action; thus, an executor can set off a statute-barred debt against

a legacy due to the debtor, or he may pay it, or retain his own statute-barred debt.

Any acknowledgment given by the executor will bind the next of kin, but not the heir or devisee (*Fordham* v. *Wallis*, 10 Hare, 227).

Any acknowledgment given by a life tenant prevents the statute from running in favour of the remainderman (*Roddam* v. *Morley*, 1 De G. & S. 1); but one devisee cannot bind another by acknowledgment or otherwise, there being no privity of estate between them (*Coope* v. *Cresswell*, 2 Eq. 106).

If the executor owes money to the estate, he is considered to have the amount of the debt as assets in his hands, and can never plead the statute; as he might, if allowed to do so, delay taking probate till the period had expired (*Ingle* v. *Richards*, 28 Beav. 366). It was decided, in *Sterndale* v. *Hankinson* (1 Sim. 393), that on an action for administration brought by one creditor on behalf of himself and the rest, every creditor had an inchoate interest in the suit to the extent of the action being considered a demand, and thus prevented the statute from running against the rest—this is now overruled by *Bray* v. *Tofield* (L. R., 18 Ch. D. 551). As an administration decree is a judgment in favour of all the creditors, any creditor may set up the statute against a debt, if the executor will not, except against the debt of the plaintiff on the basis of which the decree was made.

Judgments. The Limitation Act, 1874, s. 9, provides that no proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged on land or rent, at law or in equity, after twelve years—subject to extension through acknowledgment, &c. as above. This section applies to judgments not only when sought to be enforced against the debtor's land, but when they could affect the personalty only; for this reason, the right against the land being extinguished, a judgment

creditor seeking to enforce his claim against the personalty would be met by the objection that he was bringing an action to enforce a claim which had already ceased to exist (*Henry* v. *Smith*, 2 Dr. & War. 391).

Trusts.

As between any trustee holding on an express trust and his cestui que trust, time does not run until there has been a conveyance for value to a purchaser (3 & 4 Will. IV. c. 27, s. 25). This does not apply to a mere charge of debts, which falls under 37 & 38 Vict. c. 57, s. 9, *supra;* but there being cases in which, though in form a charge, the will was held to impose upon the devisees subject to it a personal obligation amounting to a trust, and thus falling under sect. 25, *supra*—sect. 10 of the Act of 1874 meets this, by providing that no proceeding shall be brought to recover any sum of money or legacy payable out of land and secured by an express trust, or arrears as to the same, except within the time in which it would be recoverable were there no such trust—this constituting an exception to the Judicature Act, 1873, s. 25, sub-s. 2, which provides that no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held barred by the Statute of Limitations.

Sect. 2.—Matters relative to Administration.

Legacies.

No action lies at common law against an executor for the purpose of recovering a legacy, for the common law recognizes only the right of the legal owner, *i. e.*, the executor. An exception, however, occurs where goods have been specifically bequeathed, and the executor has assented, in which case the property immediately vests in the legatee, and he can recover.

Kinds.

Legacies are divided into three classes.

1. General.

2. Demonstrative.
3. Specific.

Instances. An instance of a **general** legacy occurs where a testator bequeaths "a horse," or a sum of money, without denoting the source from which payment is to be made.

A **demonstrative** legacy is one in which it is demonstrated from what source an otherwise general legacy is to be paid, thus, "a horse from such a stud," or "a sum of money from my consols."

A **specific** legacy is a bequest of a certain specified thing, as "the thousand pounds which I have invested in three per cents.," "my favourite mare Brunette."

The above distinctions must be closely observed, as they are fertile in results.

Interest. A **general** legacy is not payable until twelve months have expired from the death of the testator, unless it is charged upon the testator's real estate, or a contrary intention appears in the will, and therefore they carry interest only from that time.

Demonstrative legacies, while the fund from which payment is directed subsists, and specific legacies, carry interest from the date of the testator's death.

Where the legacy is a contingent one, it will not carry interest from the testator's death, unless—

1. The legatee is an infant, and the testator stood *in loco parentis*, there being no other provision for maintenance.
2. A contrary intention appears.
3. The bequest is residuary.

Abatement. Upon a deficiency of assets a general legacy is liable to abate.

Ademption. A specific legacy, however, is liable to ademption, by the alienation of the subject-matter by the testator during his lifetime.

A demonstrative legacy resembles a specific one, in that it does not abate till the fund from which it is to be paid

is gone; and it resembles a general legacy, because it is not liable to ademption, in the event of the disposal by the testator of the demonstrated fund.

Donationes mortis causâ.

WARD *v.* **TURNER,**

[2 W. & T. Cas. 983.]

Conditions for validity.

A gift of this description, in order to be valid, must be made—

(i.) In such a state of illness, or expectation of death, as would warrant a supposition that the gift was made in contemplation of that event.

(ii.) On condition that it is to become absolute only upon the event of the donor's death.

It follows from this that it is a gift revocable during the donor's lifetime.

(iii.) There must be actual delivery.

To be effectual, delivery must be made to the donee or his agent, but it is not necessary that the thing itself shall be delivered; therefore the gift of a key to a safe is sufficient delivery of its contents.

Property subject to it.

A gift of title deeds, however, does not pass the estate, but the donee is entitled to retain them, and so can make his terms with the owner of the estate.

It has been held that there cannot be a good "*donatio mortis causâ*" of railway stock, nor of the donor's own cheque, unless negotiated in his lifetime.

A chose in action, however, may be the subject of this species of gift, as a bond or a mortgage deed.

Such a gift may also be made by way of trust.

It is entirely unimportant as to the validity of a gift as a *donatio mortis causâ*, whether it is accompanied by writing or not; if it does not comply with the above condition, it is void, if it does, it is good.

Where it is clear that the intention of the donor was to make a gift in a certain way, and owing to some intrinsic

deficiency, the gift is incapable of taking effect in accordance with the donor's intention, equity is always reluctant to uphold it in another way. If a gift, then, intended to be a *donatio mortis causâ* is bad as such, it will not be sustained by way of a testamentary disposition, even if there is writing; nor will an invalid testamentary disposition be upheld as a *donatio mortis causâ*, equity being unwilling to assist a volunteer.

How resembling a legacy.

A *donatio mortis causâ* resembles a legacy, in so far as it is—

1. Subject to a legacy duty; also,
2. Probate duty, since the Customs Act, 1881 (44 & 45 Vict. c. 12, s. 38);
3. On a deficiency of assets liable to the debts of the deceased;
4. Revocable;

but unlike a legacy the property in the gift vests absolutely in the donee upon the death of the donor, and therefore need not be proved nor requires the assent of the executor.

Chapter II.

PARTNERSHIP.

Partnership has been defined as "being the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all. (Pollock's Digest of Partnership.) **Definition.**

If a partnership consists of more than twenty persons, or of ten if bankers, the provisions of the Companies Act, 1862, must be complied with, or it is an illegal association, *i. e.*, it must be either registered as a company, or formed by virtue of an act of parliament or letters patent. **When a company.**

It is not necessary for the creation of a partnership that it should be by deed, or even in writing, provided the arrangement falls within the terms of the above definition.

By Bovill's Act (28 & 29 Vict. c. 86), it was enacted, that— **Bovill's Act.**

1. The advance of money by way of loan to a person engaged, or about to engage, in any trade or undertaking upon a contract *in writing* with such person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such (sect. 1). (The loan must be on the personal security of the borrower, and not on the business effects, *Ex parte Delhasse*, 7 Ch. D. 511.) **Loan to partners.**

2. No contract for the *remuneration of a servant* or agent **Salaries out of**

share of profits.

of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, nor give him the rights of a partner (sect. 2).

Annuity to widow or child of trader.

3. No person, being the *widow or child of the deceased partner of a trader*, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of, or to be subject to, any liabilities incurred by such trader (sect. 3).

Sale of goodwill.

4. No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the *goodwill* of such business, shall, by reason only of such receipt, be deemed to be a partner of, or be subject to the liabilities of, the person carrying on such business (sect. 4).

Lender and vendor of goodwill paid last.

5. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than 20*s.* in the pound, or dying in insolvent circumstances, *the lender* of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan; nor shall any such *vendor of a goodwill* as aforesaid be entitled to recover any such profits as aforesaid until the claim of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied (sect. 5).

This Act was passed with the object of confirming and enlarging the decision in the important case of

COX *v.* **HICKMAN,**

[8 H. L. 268],

where it was sought to hold the creditors of a firm liable for its debts, a deed of trust having been executed by the persons composing the firm, by which the business was to be carried on under another name, and the net proceeds

were to be divided among the creditors in satisfaction of their claims.

It was decided that the test of liability is not whether there is a participation of profits, but such a one as to constitute the relationship of principal and agent between the person taking the profits and those carrying on the business.

If, however, the arrangement between creditors and a firm is merely a colorable one, and the spirit of the Act is broken, though there may be no direct infraction of its provisions, the creditors will be held liable for the debts, as in *Pooley* v. *Driver*, 5 Ch. D. 458.

Period. Partnerships are either for a fixed term or at will. If a partnership for a fixed term is carried on beyond that term, it will be deemed a partnership at will, but the provisions in the articles for the term will apply to it so far as they are consistent with a partnership at will.

How formed. A partnership is usually constituted by deed, but it may be by parol, although its object is for the purpose of buying and selling land, and parol evidence may, in spite of the Statute of Frauds, be given to show that land has been bought, and the plaintiff is entitled to a share of the profits on re-sale (*Dale* v. *Hamilton*, 2 Phillips, 266).

Rights of partners inter se.

Cannot sue. As partners were considered as one person at law, they could not sue one another for an account, nor had the law the requisite machinery for adjusting their rights after dissolution. Hence, with the development of commercial pursuits, Courts of equity acquired an almost exclusive jurisdiction in partnership matters; and they are now assigned to the Chancery Division (Judicature Act, 1873, s. 34).

Account. A partner may bring an action for an account, when no dissolution is intended, up to the time of bringing the action, provided the complaining party is precluded from obtaining a dissolution, but no continuous account will be

granted, as the Court will not undertake the carrying on of the partnership business.

Receiver. A receiver will be appointed at the instance of a partner, when the partnership is still existing, only when special grounds can be shown, or a decree for dissolution will clearly have to be made; on dissolution, a receiver will always be appointed (2 Lindley, 1008-13).

Rights. "The partners in any firm are owners in common of all property and valuable interests originally brought into the partnership stock, or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business" (Pollock's Digest of Partnership, Ch. VI.).

As to realty. Real estate, however, belonging to the partners separately, or even as tenants in common, prior to the commencement of the partnership, will not become partnership property, although it is used for the purposes of the partnership; *secus*, if purchased with partnership funds.

Lands devised to partners are now, by the case of

WATERER *v.* WATERER,

[15 Eq. 402],

placed on the same footing as lands purchased with partnership money, and are regarded as falling into the partnership property, if they are "substantially involved in the business." All real estate, subject to agreements evincing a contrary intention, which forms part of the partnership property, is regarded as personal property, the conversion taking place immediately upon its acquisition by the partners, and it is liable to probate duty (*Att.-Gen.* v. *Hubback*, 13 Q. B. 275); but it is still considered as realty for the purposes of certain statutes, as the Mortmain Act (*Ashworth* v. *Mann*, 15 Ch. D. 363).

The share of a partner is his proportion of the partnership assets after they have all been realized and converted into money, and all the debts and liabilities have been paid and discharged (Lindley, p. 661), and each partner repaid his capital advanced.

In the absence of contrary agreement in the partnership articles, the shares of all the partners are equal, although the amounts of capital advanced are unequal. Thus they would contribute equally to the losses, and any surplus capital is equally divided.

Liabilities of partners in respect of the partnership property.

Liability.

Every partner is liable jointly with the other partners for all debts and obligations incurred while he is a partner, and in the usual course of the partnership business by or on behalf of the firm (Pollock's Dig. Ch. IV.). Upon the death of a partner, however, his estate becomes severally liable to the partnership debts (the case of *Kendall* v. *Hamilton*, 4 A. C. 504, has established that there is no separate liability *inter vivos*), the effect of this principle being, that creditors may proceed against the surviving partners or partner, or against the estate of the deceased partner; but if they adopt the latter course, and are paid in full from the deceased partner's estate, in ascertaining the amount due to the estate from the partnership, the surviving partners must give credit for the payments made on their behalf. Every partner is regarded as the agent, for partnerships purposes, of the other partner, and this is the ground of their liability, but only when he acts strictly within the scope of the business. A member of a firm of solicitors, for instance, cannot bind the other members by negotiating a bill in the name of the firm, bill discounting being ostensibly outside the ordinary limits of a solicitor's business, unless, of course, he has the special authority of the other partners to that effect; nor by undertaking to lay out a client's money on securities from time to time (*Harman* v. *Johnson*, 2 E. & B. 61). Nor can one partner bind another by a submission to arbitration. Upon the admission of a new partner the consent of all the members is required.

A partner is not liable for the debts of the firm contracted before he became a member, unless he adopts them, which he may do impliedly as well as expressly, nor for debts contracted after his retirement, and the same immunity attaches to his estate upon his death. But he is liable for all debts lawfully contracted during the time he was a partner, unless by agreement between the creditors and the new firm he is discharged from its liabilities.

Ostensible partner. Every one who by words spoken or written, or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as such to any one who has on the faith of any such representation given credit to the firm, whether the representation was or was not made or communicated to the particular person so giving credit by or with the knowledge of the apparent partner making or allowing the representation.

The liability, as stated above, is founded upon the principle commonly known as "holding out." In order to bring home liability to a person upon this ground, it must be shown that credit was given upon the faith of his name being used, and also that he knew of the use of his name, or under the circumstances ought to have known of it.

Dormant partner. A dormant partner, that is, one whose name does not appear, is also liable, on the ground that he shares in the profits.

Dissolution of the partnership.

Dissolution. Partnership is dissolved—

i. Act of party. I. By act of the parties, occurring

(1.) By lapse of time, *i. e.*, when the time has expired during which, according to agreement, the business was to be carried on, or on the happening of an event which was to determine it.

(2.) By notice, when the partnership is at will; and the fact that the partner giving notice is insane does not make any difference.

(3.) Mutual consent, without which, when the partnership is for a fixed term, no partner can retire.

(4.) In the case of a partnership at will, by the assignment or mortgage of his share by a partner, unless by agreement the shares are assignable.

II. By act of law— ii. By act of law.

(1.) By the death of a partner, not only as regards that partner, but, in the absence of agreement to the contrary, as between all the partners.

(2.) By the alienation of a partner's share owing to act of law, *e. g.*, bankruptcy, or being taken by an execution creditor.

(3.) Happening of an event which makes it unlawful or impossible to continue it.

III. By decree of the Chancery Division, which will invariably be made upon the following grounds:— iii. By decree of Court.

(1.) Where a partner has become incompetent to transact the partnership business, *e. g.*, if he has become hopelessly insane—and it will be made at the instance of the guardian of the lunatic, or of the other parties.

(2.) Where a partner can be shown to have wilfully and persistently neglected and injured the business.

(3.) Where it appears to the Court that the partnership business can be carried on only at a loss.

(4.) If it appears that the partnership has been induced by fraudulent representations.

In this case, however, the remedy is rather rescission than dissolution, the parties being placed in the "status quo."

On dissolution the goodwill must be sold. The goodwill is the chance of further custom—that which gives Goodwill.

value to the firm—and may arise from a variety of reasons, *e.g.*, a long reputation for honesty, locality (as an hotel on a good site), comprising, in fact, every advantage which has accrued from carrying on the business. In businesses where the success depends on personal qualifications, as a solicitor's, the goodwill is not valuable.

On sale of the goodwill, the vendor does not impliedly contract not to carry on a similar business, but he must not carry it on under the old name, even though it be his own name.

Lord Romilly held, in *Labouchere* v. *Dawson* (L. R., 13 Eq. 322), that such a vendor must not solicit old customers; but if they choose to come to him, he may deal with them. This case is qualified by *Pearson* v. *Pearson* (27 Ch. D. 145), where the right of setting up on his own account, when he ceased to be a member of the firm, was reserved to a partner in the partnership articles, and an injunction to prevent his soliciting old customers was refused.

If the business and goodwill has been sold by the trustee in bankruptcy of the vendor, he may set up a similar business and actively solicit the old customers (*Walker* v. *Mottram*, 45 L. T. 659).

Administration of partnership property.

Rule. In the administration of the estates of deceased partners in the Chancery Division and on bankruptcy—

1. The partnership property is applied, first, in payment of partnership debts;

2. The separate property in payment of separate debts; and

3. Any surplus of the joint estate goes for the separate creditors, and *vice versâ*.

Exceptions. But a joint creditor may prove firstly against the separate estate—

Whenever the debt has been incurred by a fraud practised on the creditor by any partner.

Also, the trustee in bankruptcy of the firm may prove against the separate estate of one partner, or the joint estate of a different firm, including any partner of the principal firm—

1. Whenever that partner or firm has fraudulently and without authorization converted partnership property; or

2. Dealt with the principal firm as a separate trader, and become a debtor to it; as where X. Y. Z. compose one firm (A.), and X. Y. another firm (B.), and in the course of trade the B. firm owes money to the A. firm. On the bankruptcy of both, the trustee of the A. firm may prove against the estate of the B. firm (*Ex parte Castell*, 3 G. & J. 124).

A person liable as partner cannot prove for a debt owing to him from the rest in competition with creditors, except—

1. In the case of fraudulent and unauthorized conversion of his property by the rest; or

2. Where there are two firms having a common partner or partners, and the one has become indebted to the other in the way of business.

Double proof.

If a bankrupt is at the time of the order of adjudication liable as a member of two distinct firms, or as a sole contractor and a member of a firm, this circumstance shall not prevent proof against the properties liable.

Secured creditors.

If a separate creditor of a partner holds a security of the firm's, or *vice versâ*, he may prove against the separate estate without giving up his security, or *vice versâ*, but must not receive more than his debt.

A separate discharge of a member of a firm releases him from the joint debts as well.

Partners by agreement can convert joint estate into separate estate, or *vice versâ*, so as to affect their creditors' interest, for the creditors have no lien on the partnership property. But the arrangement must be actually carried out.

Chapter III.

SPECIFIC PERFORMANCE.

Definition. This is the remedy in equity for the breach of an executory contract, and consists in the actual enforcement of its terms, as much as possible in their original integrity, subject to such conditions or variation as the Court may order.

The necessity for the assumption of jurisdiction in this respect by courts of equity is obvious, when we reflect how utterly inadequate the common law remedy of damages for breach of contract must often be. And yet more so when, frequently from the peculiar nature of the contract, or from some informality in its terms, there may be no common law remedy at all. We have now to consider the various conditions which must be fulfilled before the specific performance of a contract can be enforced. In the first place it follows as a matter of course that, inasmuch as this equitable remedy is based upon the general inadequacy of common law relief, in those cases where damages are sufficient compensation, a decree of specific performance will not be granted; thus, in a contract for the sale of chattels, it would, subject to exception, be absurd to enforce the contract, for articles of the same character and value could be purchased elsewhere. Thus, a noticeable exception to this rule occurs in the case of *Pusey* v. *Pusey* (1 W. & T. Cas.), and others of a like nature, where specific performance lay on account of the unique character of the subject-matter (a family heirloom) of the contract.

Conditions for the foundation of the jurisdiction.

1. No remedy at law.

2. Remedy not adequate.

3. Conditions for the exercise of the jurisdiction.

The conditions then that must be fulfilled before a *primâ facie* claim for specific performance can be established, are the following:—

1. The contract must be capable of enforcement, and

when enforced must be effectual; and so, it has been held, that a contract for the performance of continuous acts will not be enforced, neither will a contract for a partnership at will, for equity will do nothing in vain.

2. There must be a consideration for the contract, for equity will not aid a volunteer.
3. The plaintiff must not have chosen another remedy.
4. The contract must not be one for the alienation of land held in fee tail, for the Fines and Recoveries Abolition Act has taken away the jurisdiction of Courts of Equity in such cases.
5. The defendant, in an action for specific performance, must be within and subject to the jurisdiction, for the maxim *æquitas agit in personam* applies.

Contracts entered into abroad may, however, be enforced in this country, in accordance with the rule "*actio sequitur forum rei.*" Hence, in an action for breach of a contract entered into abroad, it is no defence to say there would have been no decree for specific performance granted in the country where the parties had contracted, provided that the defendant is within and subject to the jurisdiction; for, since equity acts upon the person, it is immaterial where the subject-matter of the contract may be, so long as the Court can put pressure upon the person. But there must be privity of contract between the parties; for the Court will not recognize rights arising from privity of estate in other countries.

Relief in contracts not concerning land.

Before proceeding to deal with the specific performance of contracts relating to land, which constitute by far the most important branch of this subject, it would be well to notice some of the exceptional cases where this remedy is obtainable in other contracts.

The Court will, as a rule, enforce the actual performance of any contract, although from its nature it may seem to be outside the scope of equitable jurisdiction, where—

1. The damage sustained by the breach cannot con-

veniently be ascertained, and so there is a difficulty in the application of the legal remedy; *e. g.*, Lord Hardwicke, in *Taylor* v. *Neville* (3 Atk. 384), decreed specific performance of a contract for the sale of a large quantity of iron, the terms of the contract being that the iron was to be delivered in the course of a certain number of years, and paid for by instalments; the ground for the decision being that damages could not properly be ascertained, as the profit under the contract would depend on future events.

2. Some peculiar relation between the parties exists; thus, where a trust is created, it will be enforced, though the subject-matter is a chattel.

3. The subject-matter is extraordinary. See *Pusey* v. *Pusey*, *supra*, p. 104, and *Somerset* v. *Cookson* (3 P. Wms. 389; 1 W. & T. L. C. 891), where the subject of the contract was a Greek altar-piece.

ing acts. There is one class of cases of so important a character as to deserve special notice, *i. e.*, building contracts. It would seem at first sight that such contracts would fall under the heading of "contracts incapable of enforcement," and as a general principle this may be admitted; but it is now established as settled law that contracts for building will be specifically enforced where the following circumstances combine—

1. The work to be done is defined, and its performance is essential to the plaintiff.
2. The defendants have obtained possession under the contract (*vide Storer* v. *S. W. Rail. Co.*, 2 Y. & C. C. C. 48; *Wilson* v. *Furness Rail. Co.*, 9 Eq. 28).

And since Lord Cairns' Act (21 & 22 Vict. c. 27), which gave the Court power to award damages in substitution for or in addition to specific performance, or an injunction, in cases, as where B. agrees with A. to build a house upon land belonging to A., and then to accept a lease of it, and subsequently refuses to fulfil the contract, the Court will award damages for the non-building of the house, and

compel performance of the contract to accept a lease (*Soames* v. *Edge*, Johns. 669).

Specific performance usually lies for breach of contracts for the sale of land, as, owing to the beauty or locality of the property or other causes, which may make its acquisition desirable, the remedy in damages is frequently incomplete.

The Statute of Frauds.

Its bearing upon the subject—

Actions concerning land.

By the 4th section of this statute, it was enacted that no action should be brought upon a contract for the sale of lands, tenements, or hereditaments, or any interest therein, unless the agreement was in writing and signed by the party to be charged, or his agent. The defence of "no writing" is one that is constantly raised in actions for specific performance, as being at the same time a simple and yet powerful defence.

This defence will be disallowed under the following circumstances:—

Part-performance.

1. Where there is part-performance.

The leading case on the point is

LESTER *v.* **FOXCROFT,**

[1 W. & T. Cas.],

where specific performance of a parol agreement to grant a lease was enforced, on the ground that the plaintiff had partially performed his part of the contract, by pulling down old buildings and erecting new ones; it being held, that it was unconscionable to allow the defendant to plead the statute, after he had practically admitted the contract, and had acquiesced to some extent in its performance. From the cases on this branch of the subject, the following principles have been deduced.

(1) The acts alleged to be acts of part-performance must be referable only to the alleged contract.

(2) Marriage is, in consequence, not sufficient part-performance.

(3) Nor payment or part-payment of purchase-money, as it can be repaid.

(4) Entry into possession may or may not be sufficient part-performance. If the possession can be explained by no other surmise than as an act done in pursuance of a pre-existing contract, it is sufficient.

Fraud.

2. **Fraud.**

As the Statute of Frauds was especially framed with the object of defeating frauds, the Court will not allow it to operate as an instrument of fraud.

Therefore, where a contract which requires to be in writing is, owing to some fraudulent device, unwritten, or unsigned by the defendant, the defence of the statute is unavailing.

Thus, in *Jones* v. *Badley* (3 Ch. 364), where A., being aware that B. was about to leave certain property to him on trust, succeeded in preventing B. from expressing the trust in writing, by pretending that if the property were left to him, he would carry out the testator's wishes, he was, notwithstanding that the Wills Act had not been complied with, compelled to execute the trust.

Parol variation.

A kindred class of cases to the above are those falling under the general question as to the—

Admissibility of parol evidence to effect a variation of a written contract.

On examination of the wording of sect. 4, its effect may be perceived to be "that an unwritten contract, in certain specified cases, shall not be binding," and nothing more. It does not even go so far as to say that a written contract shall be binding. Partly owing to the language of this section, and partly, no doubt, to the general principles of

evidence, which regard writing as a more important and reliable form of testimony than parol statements, it has long been established, in Courts of Equity, that a parol variation of a written contract cannot be proved by parol evidence, by a plaintiff seeking specific performance of the written contract with the variation; and that such evidence would be totally inadmissible, as it would tend to show that an agreement, required by law to be in writing, is, in fact unwritten; and so far the rule appears to be unobjectionable, and in accordance with one of the first principles of the law of evidence; but occupying the position of a corollary, as it were, to the above rule, we find another, which cannot be regarded as otherwise than anomalous and paradoxical. It is this: "that although parol evidence is not available for a plaintiff seeking specific performance with an unwritten variation, it is available for a defendant resisting specific performance under a similar condition;" and so, if a defendant to an action for specific performance can show that there was a parol variation of the written contract, he will be enabled successfully to resist the plaintiff's claim, unless the plaintiff will agree to specific performance, plus the variation, as shown by the defendant.

There is probably no rule of law or equity which has been subjected to more severe criticism. (*Vide* the excellent treatise on Specific Performance, written by the present Lord Justice Fry.)

The leading cases establishing this doctrine are—

WOOLLAM *v.* HEARN,

[7 Ves. 219],

and

TOWNSHEND *v.* STANGROOM,

[6 Ves. 328].

In the first, the plaintiff's bill (now action) was dismissed, on the ground that, as plaintiff, he could not produce evidence of a parol variation; and in the second, where

there was one bill by the plaintiff for specific performance with a parol variation, and another bill by the defendant for the enforcement of the written contract as it stood, Lord Eldon dismissed both, on the ground that the plaintiff's parol evidence in the one case was inadmissible; and that in the other, *mutatis mutandis*, it was admissible, he being then in the position of defendant, and entitled to produce parol testimony of the variation by way of defence.

It has been already noticed that where the plaintiff, seeking specific performance of an unwritten contract, when writing is requisite, can show part-performance of the contract, subject to the qualifications previously mentioned, his claim will be enforced; and so a plaintiff seeking specific performance of a written contract, with a parol variation, may obtain redress, provided that he can show performance or part-performance of the parol variation, and to show this parol evidence is admissible; but this is the only case where a plaintiff suing upon a written contract may adduce parol evidence. Even in the case of fraud, though it has been shown before that where, owing to the fraud of the defendant, there has been no writing, a plaintiff may prove by parol testimony that the illegality of the contract is due to the defendant's fraud, and may obtain enforcement of the contract, yet the plaintiff is not entitled to show, by verbal testimony (subject to the exception as to part-performance), that a parol variation of a written contract was agreed upon, even when it was due to defendant's fraud that the parol variation was not committed to writing.

It only remains to be added that a plaintiff can generally obtain enforcement of the contract by submitting to the parol variation as proved by the defendant.

Time as affecting the contract.

Time, when the essence of the contract.

Under an open contract for sale, the equitable maxim, "*vigilantibus non dormientibus æquitas subvenit*," is ap-

plicable as a general principle; but, of course, under conditions of sale, both parties to the contract will be bound by the conditions, subject to the following observations.

In

SETON *v.* SLADE,

[7 Ves. 265],

the leading authority on this branch of cases, the plaintiff sought to enforce a contract signed by the defendant, one of the conditions of sale being, that a good title to the property should be shown within two months from the date of the contract. The abstract of title was delivered to the defendant only a few days prior to the expiration of the time fixed; but, inasmuch as the defendant received and detained the abstract, without raising an objection at the time, the Court held that he could not insist on the time as being of the essence of the contract, and the plaintiff's claim was allowed.

Time is considered in equity as being essential to the contract in the following cases:—

1. Where, owing to the nature of the property, the value of it fluctuates; *e. g.*, leaseholds, reversions, &c.
2. Where it must be so inferred from the intention of a party entering into a contract; *e. g.*, in the sale of a public-house as a going concern, and where premises are sold for commercial purposes.
3. Where the purchase takes place under a right of pre-emption.
4. Where the parties have expressly agreed that it is to be essential, but the time limited for the completion of a contract may be enlarged or entirely waived by subsequent conduct, or by agreement between the parties.
5. Where it is apparently impossible that an intending purchaser can pay the price within the time specified, the vendor as a rule may rescind the contract.

As a general rule the purchaser is entitled to receive the

rents and profits of an estate from the time when the contract should have been completed, and *vice versâ* the vendor is entitled to receive interest on the unpaid purchase-money, or any portion of it, from the same date; but where one of the parties is in default in respect to time, and an enlargement of the time is granted, the other only is entitled to receive interest, or the rents and profits, as the case may be.

The defences to the action.

An action for specific performance may, as a rule, be successfully resisted upon the following grounds:—

1. Non-conclusion of the contract.

There must be an absolutely concluded contract, and no action can successfully be brought upon a mere negotiation for a contract.

2. Incompleteness of the contract.

There must not only be a contract, but, in the words of Lord Rosslyn, in the case of *Lord Walpole* v. *Lord Ormond* (2 Ves. 420), the agreement, in order to be executed by the Court, must be certain and defined, equal and fair, and must be proved in such manner as the law requires.

3. Want of fairness in the contract.

4. Hardship of the contract.

5. Inadequacy of the consideration.

6. Want of Mutuality.

This is a most important defence, and deserves the closest attention. It is founded on the broad principle that it is inequitable for one party to compel the other to do a certain act, when no remedy would have been obtainable against the one seeking redress had the position of the parties been changed.

An important exception to this rule is the case of the Statute of Frauds, where only the party who signs is liable.

7. **Illegality** of the contract.

8. **Misrepresentation.**

9. **Fraud**—already discussed.

10. **Surprise.**

11. **Mistake.**

It is apparent, from what has already appeared, that there is a considerable and material difference in the position of a party to an action for specific performance when he is plaintiff and when he is defendant; and so, too, is there a great distinction to be drawn between a vendor seeking specific performance and a purchaser when seeking it.

As a general rule, in equity, if the vendor can sell substantially that which he has contracted to sell, the purchaser must take it; but where the quality of the estate which the vendor possesses is inferior to that which he contracted to sell, he cannot force it upon an unwilling purchaser: thus a purchaser cannot be compelled to take leasehold instead of freehold. But in the case of a purchaser seeking specific performance, he can, as a rule, compel the vendor to sell whatever interest in the property he possesses, with compensation for the deficiency, whether the difference is one of quality or quantity, unless, indeed, the vendor's title is defective.

Chapter IV.

INJUNCTIONS.

An injunction is an equitable decree, the purport of which is to restrain the commission of any particular act, or, apart from the question of contract, where the remedy, as has been shown, is specific performance, to compel some particular act to be done.

The latter decree, however, which is termed a mandatory injunction, is of very rare occurrence.

Division. The subject of injunctions may be conveniently divided into two parts—

1. Where there is no remedy at law.
2. Where there is no adequate remedy at law.

The leading case on injunctions where there is no legal remedy is

THE EARL OF OXFORD'S CASE,

[1 Ch. R. 1],

in which the right of Courts of equity to restrain a successful plaintiff at law from giving an unconscientious effect to the judgment he had obtained was fully established.

By the Judicature Act, 1873, s. 24, sub-s. 5, it was enacted that no injunction should issue from the Court of Chancery to restrain proceedings at law, but that any matter of equity, which before the Act would have been a sufficient ground for obtaining an injunction, could, after the Act, be relied on as a defence in the proceedings. This section does not interfere with the granting of an injunction restraining the institution of proceedings (*Besant* v. *Wood*, 12 Ch. D. 630).

The Court of Chancery still retains the power to restrain proceedings in Courts not affected by the Judicature Acts,

as in foreign Courts, provided the party sought to be restrained is within the jurisdiction, and in the Lord Mayor's Court.

Injunctions to restrain an improper marriage, or even communication, with a ward of Court, aptly illustrate the beneficial and important character of this jurisdiction.

The same remedy, too, is applicable in cases where it is sought to prohibit an anticipated breach of trust.

Injunctions are: Interlocutory;

It is here well to observe that injunctions may be either interlocutory or perpetual. An interlocutory injunction is granted in the course of the proceedings in cases of emergency, or to protect the subject-matter of the action, until the decree is pronounced.

Perpetual.

A perpetual injunction is the final decree, or a portion of it, pronounced by the Court, and operates in perpetuity.

Requisites.

It is necessary for a plaintiff seeking an injunction in a Court of equity to show—

1. That he has a *primâ facie* right at law.
2. That the defendant's claim is equivocal, or that the defendant's action is prejudicial to his right, where the right itself is not in dispute.
3. That the legal remedy is inadequate.

Waste.

Injunctions restraining waste are worthy of especial notice, as also the distinction between what is termed legal and equitable waste.

By the Judicature Act, 1873, s. 25, sub-s. 3, it was enacted, that "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate;" and by sub-s. 11, which enacted that, in case of a conflict between law and equity, equitable rules should prevail, tenants for years and others were brought within the 25th section.

Before the passing of the Judicature Acts, there was no

remedy at law against the commission of equitable waste; in fact, until the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), was passed, the only remedy available at law against legal waste was an action for damages; but by the last-mentioned Act Courts of law were empowered to prohibit legal waste by injunction.

Although Courts of law have now power, equally with the Chancery Courts, to restrain even equitable waste, yet the machinery of the latter Courts is so infinitely superior, particularly in the process of taking accounts between the parties, that it is the invariable custom to resort to them for injunctions to restrain waste.

In a tenancy "without impeachment of waste" at law the tenant could commit most serious depredations upon the property with impunity, and could practically destroy, to a large extent, the rights of remaindermen and reversioners.

Equity, however, considering such acts unconscientious, restrained them by injunction, as in cases of—

1. Felling ornamental timber.
2. The wanton destruction of a mansion-house, or farm houses.
3. Denuding the estate of timber.
4. Working mines in a destructive manner.

Injunctions can also be obtained to restrain nuisances and trespass, subject, generally speaking, to the conditions already laid down, and they are peculiarly the remedy in cases of infringement of copyright and other patent rights.

Chapter V.

INSTANCES OF JURISDICTION ANALOGOUS TO INJUNCTION.

Sect. 1.—Bills to establish Wills.

Courts of equity have acquired jurisdiction over wills when these came indirectly before them, as when called upon to execute the trusts of a will. If the validity of the will was admitted, the Court would act on it; if not, it would require it to be established, which was done by directing an issue to be tried at the assizes, and on the finding declare the will to be established, or prove the will itself *per testes*.

A devisee, to prevent the heir contesting the devise at some future time when evidence might not be forthcoming, could come as plaintiff before the Court with a view to establish it, there being no other way open for him to settle its validity at once, as at law he was obliged to wait till the heir brought ejectment (*Boyce* v. *Besborough*, Kay, 71). This the heir could never do, unless by consent, or to remove impediments to his bringing ejectment at law, because he had a remedy by ejectment at law.

Recent cases (*Allen* v. *M'Pherson*, 1 H. L. Cas. 191; and *Milton* v. *Melhuish*, L. R., 3 Ch. D. 27) decide that the Court will assume jurisdiction only where the Probate Division has none—that is, in wills dealing exclusively with real estate.

Sect. 2.—Ne exeat regno.

This was a prerogative writ, issued to prevent a person from leaving the realm. It lay only (with two exceptions, 1. where a balance is admitted to be due by the defendant, but the plaintiff claims a larger sum—this, consequently being a matter of account; 2. where alimony has been decreed) for equitable debts, which were certain in amount, and was even then applied very cautiously. Jessel, M. R., was of opinion, in *Drover* v. *Beyer* (28 W. R. 110), that since the Judicature Act, 1873, which has assimilated legal and equitable debts, the writ is not preserved for the latter, and can only be issued in cases coming under sect. 6 of the Debtors Act, 1869.

A debtor may be arrested if about to abscond after presentation of a bankruptcy petition or issue of a bankruptcy notice (Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 25).

Sect. 3.—Other Instances.

Bills to perpetuate testimony.

A part of the now obsolete auxiliary jurisdiction of equity were bills to **perpetuate testimony**, the object of which was to preserve evidence when in danger of being lost before litigation could occur; and also bills to take testimony **de bene esse**, *i. e.*, to take the testimony of persons too infirm to attend the hearing or resident abroad; these latter could only be brought while an action was pending and not before.

Bills quia timet.

Also bills **quia timet**—which were in the nature of writs of prevention—the party seeking the aid of the Court, because he feared some probable injury to his rights.

Bills of peace.

Also **bills of peace**, brought to perpetuate rights which persons claimed, and which from their very nature might be controverted by different persons at different times, and by different actions, whenever justice required that the party should be quieted.

Also the Court could direct the cancellation and delivery up of certain instruments, void or voidable, in case, having an appearance of validity, they might be afterwards used, when the evidence to impeach them was lost, for purposes of fraud.

Cancellation of instruments.

Since the Judicature Act the jurisdiction of equity in matters like these is no longer exclusive or auxiliary, but concurrent, although by s. 34, sub-s. 3, the rectification and cancellation of documents is assigned to the Chancery Division.

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